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Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

MAENETTE B. SMITH, *et vir.*,

Petitioners,

v.

MARYLAND-NATIONAL CAPITAL
PARK AND PLANNING COMMISSION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO
THE COURT OF SPECIAL APPEALS OF MARYLAND

PETITION FOR A WRIT OF CERTIORARI

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38 pp

QUESTIONS PRESENTED

I. Whether it is a denial of due process or equal protection under the U.S. Constitution where a state appellate court by two different panels of the same court on the same set of facts renders inconsistent decisions that are opposite in effect thereby denying a jury trial and other relief under 42 U.S.C. 1983.

II. Whether a landowner is denied equal protection or due process under the U.S. Constitution where the issues of law determined by the state court do not apply equally to all similarly situated litigants.

III. Whether the state court correctly applied the law of *res judicata*.

IV. Whether a landowner must be deprived of all beneficial use of his property for there to be a taking of property under the U.S. Constitution.

PARTIES TO THE PROCEEDINGS

The petitioners are Maenette B. Smith and Jess Joseph Smith, husband and wife, as tenant-by-entirety owners of the subject property.

The respondents are the Maryland-National Capital Park and Planning Commission and Prince George's County, Maryland.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Maenette B. Smith, et vir, respectfully petition for a writ of certiorari to review the judgment of the Court of Special Appeals of Maryland in this case.

OPINIONS BELOW

The opinion of the Court of Special Appeals of Maryland ("1st CSA"), filed April 28, 1992, App. 1a, and is unreported. The opinion of the trial court, Judge Johnson, of the Circuit Court for Prince George's County, Maryland, filed April 10, 1996, App. 15a. The opinion of the Court of Special Appeals of Maryland ("2nd CSA"), filed April 14, 1997, App. 24a, and is unreported.

JURISDICTION

The unreported opinion of the Court of Special Appeals of Maryland was filed on April 14, 1997. Petition for Writ of Certiorari to the Court of Appeals of Maryland was denied on August 22, 1997. Petition for Extraordinary Relief to the Court of Special Appeals of Maryland was denied on November 10, 1997. In Application No. A-282, Chief Justice Rehnquist extended the time within which to file a petition for a writ of certiorari until December 22, 1997. This Court has jurisdiction pursuant to 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST. amend. V, XIV, § 1
42 U.S.C. § 1983
MD. CONST., art. IV, § 18 (Michie 1997 Repl. Vol.)
MD. DECL. OF RIGHTS, art. 23, 24 (Michie 1997 Repl. Vol.)
MD. ANN. CODE, art. 28, §§ 1-101, 7-111, 8-101, 8-104, 8-106, 8-119 (Michie 1997 Repl. Vol)
MD. RULES §§ 8-113(a), 8-114(a),(b), 8-606(e)

STATEMENT OF THE CASE

This case[1] relates to a claim under 42 U.S.C. 1983 in a state court with jury demand where it is alleged by the petitioners that a building permit was wrongfully denied based on a zoning map that had been changed without notice or hearing[2] contrary to the requirements of a state statute, and to constitutional due process and equal protection. The instant case was originally dismissed by the first trial court for failure to exhaust administrative remedies since there was a co-pending administrative appeal relating to the denial of the building permit for the subject property. On appeal[3] the Court of Special Appeals of Maryland, in an unreported opinion, App. 1a, ("1st CSA"), held that the 42 U.S.C. 1983 claim was well pled, remanded the case to the trial court for a factual determination as to whether the zoning map of the subject property had been changed inasmuch as material facts were in dispute, and the case was then stayed pending the determination of the then co-pending administrative appeal case and the court issued its Mandate, App. 13a. Subsequently, the administrative appeal was determined favorably to the petitioners[4]. The building permit for the subject property was issued after an areawide Sectional Map Amendment changed the zoning map of the subject property.

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[1] There have been other cases relating to the development of the subject property and a Brief Summary of each case is at App. 106a.

[2] For emphasis added and pertinent text portions of the MD. ANN. CODE, art. 28, §§ 8-101, 8-104, and 8-106 (Michie 1997 Repl. Vol), see App. 49a-50a.

[3] Although the right to appeal is not an issue, the statutory right of appeal in Maryland is found in MD. ANN. CODE, CTS. & JUD. PROC., § 12-301 (Michie 1997 Repl. Vol).

[4] All of the files of the administrative appeal case including all of the transcripts (all testimony was under oath) and exhibits are filed in the instant case under affidavit of the Clerk of the Board of Appeals on Nov. 16, 1990, since the same evidence in that case and the subdivision case is controlling here.

The administrative appeal case was then dismissed by the trial court on March 14, 1995, all parties having withdrawn their appeal, and thus the administrative appeal case and the appealed Order of the Board of Appeals, App. 128a, became final on March 14, 1995. On remand after the building permit had been issued and the administrative appeal case dismissed by the court, the second trial court in the instant case, Judge Johnson, denied the petitioners' Motion for Partial Summary Judgment[5], granted the Maryland-National Capital Park and Planning Commission's ("M-NCPPC"[6]) Cross-Motion for Summary Judgment, and dismissed Prince George's County as a party, App. 15a. The Court of Special Appeals of Maryland, in an unreported opinion, App. 24a, ("2nd CSA"), affirmed the trial court. Petitioners filed a Petition for Writ of Certiorari in the Maryland Court of Appeals, App. 31a, that was denied on August 22, 1997, App. 62a. Petitioners filed a Petition for Extraordinary Relief with the Court of Special Appeals, App. 63a, inasmuch as the two CSA opinions were inconsistent and that Petition was denied without comment on November 10, 1997, App. 92a.

When the petitioners purchased their approximately one (1) acre of property in Upper Marlboro, Prince George's County, Maryland, in 1977, it was zoned approximately one-half in the residential zone (R-80) where the petitioner's home is located, and approximately one-half in the commercial (CSC) zone where the subject property is located.

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[5] The Motion for Partial Summary Judgment was only on the issue of liability and not on damages. In their Motion, the petitioners argued *res judicata* as to the subdivision case and the administrative appeal case, direct and collateral estoppel, detrimental reliance on the proper governmental official, and a taking of property.

[6] Although the term M-NCPPC is used throughout, M-NCPPC and Prince George's County, at all times material hereto were and are in privity with M-NCPPC making the recommendations and Prince George's County making the final determination. The term 'M-NCPPC' is used throughout to mean both M-NCCPC and Prince George's County.

Since the only approved zoning map of the subject property, dated 7/12/77, was not clear with respect to zoning lines relative to property lines, the petitioners took the zoning map of the subject property[7] to the proper governmental official at M–NCPPC who advised the petitioners how the lot should be subdivided to make it into two lots, one lot zoned all residential and one lot zoned all commercial. This advice was followed by the petitioners so that the newly created subdivision, Lot One, Marlborough House, the subject property, would be all in the CSC zone. The division of the property was selected so that the zoning line and the property line between the newly created subdivisions would be co-located along the existing zoning line thereby forming two adjacent lots with single zone zoning for each lot.

The subdivision of property in Prince George's County is controlled solely by M–NCPPC. The petitioners filed for a subdivision of their property with M–NCPPC who then denied the subdivision. Upon appeal, the M–NCPPC denial was reversed and the subdivision of the subject property was granted by the court.

In reliance upon the representation of the proper governmental official, the petitioners expended in excess of $100,000.00 in the subdivision and development of the subject property for architect, engineering, surveying, soil borings, financing, bonds, and other miscellaneous expenses, to get to the position of obtaining a building permit by complying with all of the requirements of Prince George's County for such building permit[8].

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[7] App. 140a. This is the pertinent portion of the zoning map that was taken by your petitioners to the proper official at M-NCPPC for guidance since it showed property lines that were not in existence (marked by 'x') and the absence of an alley (marked by wavy lines) adjoining the petitioners' property and forming the eastern boundary of the subject property.

[8] The affidavit of Mr. James Carr, Chief, Permit Section, Construction Standards Division, Department of Environmental Resources, Prince George's County, Maryland, dated Nov. 16, 1990, stated that the

A zoning map in Prince George's County is composed of a 'base map' that contains street locations, property boundaries, etc., and a transparent 'zoning overlay' that contains only zoning boundaries. When the zoning overlay is placed over the base map and copied, a zoning map is thereby formed. M–NCPPC maintains the base maps and the zoning overlays. The District Council maintains custody of all of the originals of the adopted and approved zoning maps. At all times material to the building permit application, the only adopted and approved zoning map of the subject property was that map known as the '77 zoning map, App. 140a, the map originally taken to the proper governmental official at M–NCPPC for assistance[9].

The only governmental entity in Prince George's County that is empowered to adopt, approve, and make any changes to a zoning map is exclusively the District Council (the elected County Council for Prince George's County, Maryland, sitting as the District Council [the same members of the County Council are called the "District Council" when they are conducting zoning business, that is, they just switch hats]) and then only after notice and hearing pursuant to Art. 28, §§ 8-101, 8-104, and 8-106, the emphasis added and pertinent text portions of which are outlined at App. 49a-50a.

On August 22, 1988, M–NCPPC changed the zoning map of the subject property without notice or hearing. On March 16, 1990, M–NCPPC, without notice or hearing, again changed the zoning map of the subject property. As a result, both zoning map changes made part of the subject property into the CSC and R-80 zones, that is, the subject property was then 'dual zoned'. Neither of these zoning maps had ever been adopted or approved by the District Council as required by statute. These two unapproved zoning maps of the subject property were nevertheless the only zoning maps

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petitioners had complied with all of the lawful requirements of a building permit except for the approval of M–NCPPC.

[9] The proper governmental official, although present at the hearing before the Board of Appeals, did not testify or contradict the testimony of the petitioners.

used by M–NCPPC to recommend denial of the building permit application for the subject property.

It is significant to note that the petitioners conceded below that, if their property had been dual zoned when they applied for a building permit, they should have done everything the trial court and the 2nd CSA suggested they should have done[10]. Likewise, the petitioners conceded below that M–NCPPC has the right and duty to maintain base maps[11].

One of the ways to change the zoning of a property is through a process called a Zoning Map Amendment where an individual application is filed at any time and considered separately by the District Council with recommendation of M–NCPPC. Another method of obtaining a change in the zoning of property is through a Sectional Map Amendment ("SMA") where a large part of the County is periodically considered for updating the zoning maps for all of the properties inside the geographical area covered by the SMA.

After the passage of time and in 1994 the subject property was considered for a SMA. Having been unsuccessful at getting a building permit for the subject property and fearing that the subject property would be downzoned to residential, the petitioners, by letter, pointed

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[10] After written notification that the building permit was denied, the petitioners met on at least two occasions with the staff of M–NCPPC to try to work out any problems but they were unsuccessful. Part of the problem was the history of M–NCPPC not wanting the project, M–NCPPC appearing in opposition where they normally did not appear in opposition, M–NCPPC improper denial of the subdivision of the subject property, changing the zoning map of the subject property without notice or hearing, and the likelihood of denial of any other proceedings before M-NCPPC relating to the proposed development that M–NCPPC did not want.

[11] But when a changed base map is copied with a zoning overly thereby creating a new zoning map, a notice and hearing is required because it changes the zoning of the property and the substantive property rights of the landowner.

out the error of the zoning designation on M–NCPPC 'zoning maps'[12] as placing the subject property in two zones.

The Clerk of the District Council testified that at the time of the building permit application and at the time of the hearing before the Board of Appeals that the only adopted and approved zoning map in existence was the 1977 zoning map.

The instant lawsuit, beginning as a declaratory judgment action, was timely filed after the petitioners had been informed orally by M–NCPPC that they would recommend denial of the building permit application based on the changed zoning map of August 22, 1988[13].

M–NCPPC has not expressly stated in any of the proceedings relating to this case that they changed the zoning map of the subject property[14]; however, they do state as their

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[12] There is no such thing as M–NCPPC 'zoning maps' and the reference was to the two zoning maps that M–NCPPC had changed without notice or hearing. M–NCPPC maintains that this is an application for rezoning and your petitioners maintain that it is a notification of an error in M–NCPPC 'zoning map' and, thus, this is the only disputed material fact in the whole case. Your petitioners submit that the subsequent rezoning issue of the subject property by SMA relates, in any event, to damages only, if any, and not to liability pursuant to 42 U.S.C. 1983.

[13] Prior to filing the instant case and on December 4, 1989, (respondent M–NCPPC exhibit #5 filed in these proceedings) the petitioners wrote the Chairman, M–NCPPC, and pointed out the error in M–NCPPC changed zoning map and asked that it be corrected because of their pending building permit application. There were several meetings with the staff of M–NCPPC before filing the instant case to try to resolve the issues, all without success (respondent M-NCPPC exhibit #6, dated Dec. 15, 1989, filed in these proceedings).

[14] M–NCPPC witnesses testified before the Board of Appeals that M–NCPPC changed the base maps of the subject property (thereby changing the zoning maps of the subject property) and that the building permit application of the petitioners was recommended for denial based on the changed zoning maps of the subject property. The Clerk of the District Council testified before the Board of Appeals that the only adopted and approved zoning map of the subject property was the 1977

reasons for changing the zoning maps of the subject property that the petitioners' surveyor made a mistake, that the petitioners refused an offer for a new survey, that the petitioners failed to contact them after the notice of denial of the building permit application and that petitioners failed to ask for a special exception or a change of zoning for their then allegedly dual zoned lot.[15] M-NCPPC clearly does not have the power to change zoning maps[16], Md. Ann. Code, art. 28, §§ 8-101, 8-104, 8-106.

FEDERAL QUESTIONS: The federal questions relating to 42 U.S.C. 1983, due process, *res judicata*[17], estoppel, and taking were raised in the Second Amended Complaint[18], paper #59, para. #40, filed in these proceedings on Nov. 11, 1990, and printed below. All of these issues have been vigorously pressed before every court considering this case since that time. The questions relating to inconsistent opinions of the CSA were advanced before the court that issued them, the CSA, by way of a Petition for Extraordinary Relief, App. 63a, filed in the CSA on Oct. 15, 1997, and

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zoning map, the one used by the petitioners to subdivide their property originally.

[15] The petitioners met with M–NCPPC on several occasions to try to resolve any disputes, without success, both before and after the written notice that M–NCPPC would recommend denial of the building permit application. See also footnote 10.

[16] Counsel for M–NCPPC, in his final argument before the Board of Appeals stated: "Park and Planning doesn't make its own zoning maps. Clearly, we don't have the authority for that, and there is no argument on that." See also, MD. ANN. CODE, art. 28, §§ 7-111, 8-119.

[17] "Issue of the case", being part of the law of *res judicata*, was raised at the outset of this case but the specific terminology "claim or issue preclusion" was used for the first time in the Appellant's Brief filed before the 2nd CSA case, on Sept. 23, 1996. After the administrative appeal case was dismissed, *res judicata* with respect to the administrative appeal case was raised for the first time in the Motion for Partial Summary judgment filed on Dec. 1, 1995.

[18] The 1st CSA found that the 42 U.S.C. 1983 claim had been properly pled and mandated its adjudication.

Appellants' Reply to MNCPPC Opposition filed on Oct. 22, 1997, and the requested relief was denied, App. 92a.

The questions relating to issues being contrary to the remand from the 1st CSA and loss of jury trial were raised in the Brief of Appellants (petitioners here) before the 2nd CSA, filed on Sept. 23, 1996, wherein it was said: "Clearly this assumption by the trial court is contrary to the remand from the Court of Special Appeals in this case to determine whether, in fact, there had been a change in the zoning".

The federal questions of both due process and equal protection (U.S. Const. and MD Const.) relating to jurisdiction of the 2nd CSA was raised in the Petition for Extraordinaary Relief filed on Oct. 15, 1997.

The issue of inconsistent opinions was raised the first time available to the petitioners in the Petition for Writ of Certiorari to the Maryland Court of Appeals, App. 31a.

The issue relating to unpublished opinions was raised in the Petition for Writ of Certiorari to the Maryland Court of Appeals, App. 31a, and the Petition for Extraordinary Relief, App. 63a, filed before the CSA on Oct. 15, 1997, and in Appellants' Reply to MNCPPC Opposition filed on Oct. 22, 1997, para. 3 below. The requested relief was denied, App. 92a.

> "3. It is submitted that it is a denial of due process and equal protection provided by the U.S. Constitution where: (1) the Trial Court failed to adjudicate issues in regard to a federal claim under 42 U.S.C. 1983, particularly since this was the primary issue in 1st CSA, where the Court said that the issue had been well pled, and the case was remanded for that among other reasons, (2) the Trial Court failed to adjudicate the issues in regard to reliance on the proper governmental official and estoppel, (3) to issue an 'unpublished opinion' in a land use case while other land use cases are not so treated, and (4) that Maryland Rules 8-113 and 8-114 are unconstitutional as applied in this case."

Because the language of the 2nd CSA relevant to the issues raised is not clear, the peitioners are not certain specifically what the court passed on except that it stated that the petitioners were not entitled to damages, there was no taking, and the Prince George's County was properly dismissed[19]. Neither the trial court, Judge Johnson, or the 2nd CSA addressed the claim under 42 U.S.C. 1983. Although pressed at every level, the issues relating to *res judicata* of the subdivision case, estoppel, and detrimental reliance have never been addressed by any Maryland court.

> "40. That all of the aforesaid acts by the Defendants, MNCPPC, Prince George's County, and the District Council, were arbitrary, capricious, and unreasonable, unlawful and without any foundation in law, are barred by res judicata and collateral estoppel, and the Plaintiffs are entitled to rely on governmental employees whose job and duty it is to see that their development is properly subdivided and constructed, serve no substantial public purpose or legitimate governmental objective, are vindictive against your Plaintiff's who were successful against the MNCPPC in having their property subdivided contrary to the desires and wishes of the MNCPPC, apply the rules, regulations, ordinances, and laws relating to the development of the subject differently than other similar property, is ultra vires, is an improper exercise of the police power, is unduly harsh impact on the owners and Plaintiffs, failed to follow their own procedures in changing the zoning map of the subject property, unlawfully withholding a building permit, is a substantial interference with the Plaintiffs' property rights, a deprivation or taking of the Plaintiffs' property without due process contrary to the Federal and State constitutions, and that such actions are, further, in bad faith and without substantial justification, and are for the purpose of delay with the

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[19] Before Judge Johnson, the District Council had been previously dismissed by the Petitioners.

full knowledge that the laws effecting the development of the subject property will make the development impossible to construct or complete if the matter can be prolonged long enough."

REASONS FOR GRANTING THE PETITION

I. Inconsistent Opinions from Same Court, Jurisprudential Scandal

Actions relating to 42 U.S.C. 1983 may properly be brought in state courts, *Martinez v California*, 444 U.S. 277 (1980), *Maine v. Thiboutot*, 448 U.S. 1 (1980). And "That the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court."[20], *Shelley v. Kraemer*, 334 U.S. 1, 14 (1948). See also, *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930). And a jury trial is proper in a 42 U.S.C. 1983 case, *Burt v. Board of Trustees*, 521 F.2d 1201 (CA4 1975), *aff'd*, *Burt v. Abel*, 466 F.Supp. 1234 (1979).

Because the 1st CSA remanded this case for a determination of the factual issue of whether the zoning of the subject property had been changed, the trial court, Judge Johnson, and the 2nd CSA, it is submitted, were compelled to follow such order and mandate and had no jurisdiction to do otherwise, Maryland Rule 8-606(e), and as the Maryland Court of Appeals said in *Klopfer v. Werber*, 264 Md. 419, 421, 422, 286 A.2d 776 (1972), that: "When the mandate has been transmitted the lower court shall proceed according to the tenor and directions thereof... ...and could pass no valid decree or order in respect thereto, which was not in

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[20] It is sometimes difficult to separate arguments with respect to equal protection and due process, U.S. CONST., amend. XIV, § 1, and the arguments made in these first two issues both relate to amend. XIV, § 1 although it may not be expressly indicated separately in each argument.

conformity with the opinion and mandate of this Court. *Maloy v. McLean*, 140 Md. 306". Cf. *McNeil v. State*, 112 Md App. 434, 685 A.2d 839 (1996). See also *Evitts v. Lucey*, 469 U.S. 387, 393 (1985), for the proposition that a state's appellate procedures must comply with the due process clause of the U.S. Constitution, Fourteenth Amendment, although a criminal case relating to the effectiveness of counsel.

"Obviously, if two decisions are inconsistent, one of them is wrong. Without more, however, the evil does not lie in the inconsistency; it lies in the erroneous decision."[21] One of the hallmarks of the judicial system is the doctrine of *stare decisis*, and it has been said[22]: "The nub of the matter is that *stare decisis* does not spring full-grown from a 'precedent' but from precedents which reflect principle and doctrine rationally evolved .... [T]here is potential for jurisprudential scandal in a court which decides one way one day and another way the next ...". Of course, the effect of two inconsistent decisions is avoided by making the cases unreported as argued, *infra*, with respect to issue II, equal protection. Further, the dissenting opinion expressed in *Smith v. Allwright*, 321 U.S. 649, 669 (1944), concerning the courts' changing rationale for its decision might be said of the inconsistent opinions of the CSA in the instant case that it "...tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only."

Here, the 1st CSA determined that the issue of the zoning of the property is an issue of material fact and remanded the case to the trial court, App. 11a-12a. On remand, the trial court then **assumed** that the property had, as a matter of fact, been rezoned notwithstanding the dictates of the 1st CSA that the issue of rezoning the subject property was a disputed question of material fact. As the trial court

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[21] McCoid, II, *Inconsistent Judgments*, 48 WASH. & LEE L. REV. 487, 488 (1991).

[22] Dunn, *Unreported Decisions in the United States Courts of Appeals*, 63 CORNELL L. REV. 128, 145, n. 110 (1977).

stated, App. 16a, 5th line: "Lot 1-Marlborough House, on the other hand, was dual-zoned at the time this action was instituted and is the subject of the proceedings before the Court." Further, the trial court, App. 19a, 2nd full para., 5th line, said: "Contrary to the Smiths' representations regarding the effect of the M–NCPPC updating base maps, the Court finds that the agency did not cause Lot 1-Marlborough House to be dual-zoned." Likewise, the trial court made a finding of fact that the Smith's property was dual-zoned when it said at App. 21a, 1st sentence, "The Smiths' property was dual-zoned and did not conform with certain of the County's plans and policies." -- All notwithstanding the 1st CSA that stated that the question of rezoning was a disputed question of fact. The 2nd CSA opinion, likewise, **assumes** or finds that the subject property was not rezoned, that is, it was in dual zones as a matter of fact. As the 2nd CSA said at App. 26a, 1st sentence, "Upon reviewing the Smiths' application, M–NCPPC realized that a portion of the Property was zoned R-80 and a portion was zoned C-S-C" (in accord is footnote 3 at App. 26a). Likewise at App. 30a, 1st sentence, "Before being updated by M–NCPPC, the Property was zoned both R-80 and C-S-C."

The trial court and the 2nd CSA criticize the petitioners for, *inter alia*, not complying with the request of the M–NCPPC to obtain a special exception, a rezoning, a survey[23], etc. The motivation for the trial court[24] and the 2nd

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[23] The northern boundary of the petitioners' property (that boundary found by the Board of Appeals that M-NCPPC had changed [App. 133a-134a, findings 9, 11, 14]) had been fixed by Deed of Agreement recorded among the Land Records of the County in 1968 as shown by the exhibits in this case as well as from the records of M–NCPPC. The east boundary of the subject property was formed by the alley, the south boundary by Church Street, and the western boundary was owned by the petitioners. Other reasons for not needing a surveyor are that a duly registered surveyor had been employed who explicitly followed the directions of the proper representative of the M–NCPPC, there was a court approved subdivision plat established boundary lines, the subdivision plat approved by Chairman, M–NCPPC, the subdivision plat

CSA by use of the terms like 'misrepresentations'[25] and disingenuous[26] is not clear. As the petitioners have previously conceded[27], had the property been dual zoned, in fact, when the building permit had been applied for, the petitioners should have done everything the trial court and 2nd CSA suggested that they did not do[28].

Fundamental fairness, it is submitted, depends on the facts of the particular case, *Lassiter v. Dept. of Social Services*, 452 U.S. 18 (1981), see also, *Richards v. Jefferson*

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that was approved by Chairman, M–NCPPC, was recorded among Land Records of County, and the Board of Appeals, by the time this argument was made in court, had decided the case in favor of the petitioners.

[24] The issue of the trial court's appearance of impropriety was raised in the petitioners Petition for Extraordinary Relief, App. at 68a, denied by the Court of Special Appeals on Nov. 10, 1997. This, of course, would not be an issue if the trial judge's son had been working for one of the parties for an extended time prior to the litigation or if counsel had known of it prior to the judge's consideration of this case. Petitioners were informed on or about the date of Judge Johnson's order that Judge Johnson's son had a job application in with M–NCPPC and Judge Johnson's son was, in fact, employed by M–NCPPC while the case was still pending before Judge Johnson.

[25] No representations are specifically referred to because there are none.

[26] At all levels of this land use litigation the parties have attempted to settle the matter but the factual context does not permit such an easy solution. It is respectfully noted that most of the time consumed in this litigation relates to the administrative appeal that was resolved adversely to M–NCPPC and the appeal was taken by M–NCPPC when it had no right to appeal and, as such, was frivolous.

[27] The petitioners also have previously conceded that M-NCPPC has the authority to change the base maps and probably should to keep the fire department, road names, house numbers, etc., correctly identified; however, when a change in a base map changes the zoning map, then there must be notice and a hearing.

[28] It is respectfully pointed out that the trial judge in the subdivision case found the petitioners, "Mr. Smith and his wife showed total flexibility to all of the reasonable suggestions of compromise and conditions for the approval of these subdivisions and the allegation that they were arbitrary or adamant about not doing so, is simply not true. The facts don't support it.", App. 120a, 2nd full para.

Co., 116 S.Ct. 1761 (1996). It is submitted that this case is a clear example of the denial of the fundamental fairness that characterizes a denial of due process. Further, under the "rational basis" test, *Bankers Life and Cas. Co. v. Crenshaw*, 486 U.S. 84 (1988), the petitioners have been clearly denied due process and equal protection.

It is submitted that it would be unfair to a litigant for the court to ignore the court's own rules and the prior rulings with respect to jurisdiction of the court and fundamental fairness requires that courts determine the cases before them fairly based on the law that is pertinent to the facts of the particular case, as this Court said in *Morton v. Ruiz*, 415 U.S. 199, 235 (1974), "Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures." This principle applies likewise to changing zoning maps without notice or hearing. And it is reversible error not to follow established procedures, *Montilla v. INS*, 926 F.2d 162 (2nd Cir 1991).

Failure to decide or even comment on dispositive issues, e.g., *res judicata* as to the subdivision case, collateral estoppel, and detrimental reliance on the proper governmental official, is, it is submitted, effectively a denial of meaningful access to the courts, *Bounds v. Smith*, 430 U.S. 817 (1977), although a criminal case.

The decision of the 2nd CSA effectively denied a jury trial thereby denying your petitioners due process, Maryland Constitution, Declaration of Rights Article 23 and 24. Further, the failure to give notice and a hearing when the zoning map of the subject property was changed is, likewise, a violation of your petitioners' due process, *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950)[29].

Further the 2nd CSA did not find any material facts in dispute, and stated that "We agree with the Smiths and

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[29] "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

M-NCPPC that there are no material facts in dispute.", App. 28a, 3rd line. Such a finding of fact by the 2nd CSA seems inconsistent even with its own decision in the case. It is presumed that this language means that the fact that M–NCPPC changed the zoning map of the subject property without notice or hearing (since that fact is undisputed by any party) and that M–NCPPC then relied on the changed zoning map to recommend denial of the building permit application of the petitioners (another fact that is undisputed by any party), does not entitle the petitioners to a partial summary judgment on the issue of liability. This reasoning and such position of the 2nd CSA seems to be inconsistent with the holding of the court (and that of the 1st CSA).

The 2nd CSA states, App. 28a, 4th line from top, that "What is in dispute, however, is whether the Smiths' are entitled to damages." It is respectfully pointed out to the Court, that the petitioners were not seeking damages in their Motion for Partial Summary Judgment[30]. This position of the 2nd CSA seems to be inconsistent with its holding since the issue of damages was not an issue in the Motion for Partial Summary Judgment solely on the issue of liability.

II. Unreported Opinions – Kiss of Judicial Death

The reported versus unreported judicial opinion[31] and the non-precedent status of judicial opinions is a cancerous and festering growth on the entire judicial system that merits

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[30] As the petitioners stated in their prayer for relief they were only seeking a partial judgment on the issue of liability: "WHEREFORE, your Plaintiffs pray: 1. That this motion for Partial Summary Judgment of the issue of liability be granted. 2. And for such other and further relief as the Court may deem just and proper." Nowhere in the pleadings on this motion did the petitioners ask for damages.

[31] For simplicity, the term 'unreported opinion' is used to represent unreported and unpublished opinions, decisions, judgments or rules of law by courts and includes the non-citation rule like that found in Maryland Rule 8-114, App. 162a—163a.

plenary attention and direction by this Court[32]. This issue relates to unreported opinions that, by rule of court, do not apply to other litigants[33]. The breadth of the problem is perhaps best shown by the voluminous scrutiny and criticism in the legal literature as measured against the opinion of the state appellate court in this case. Although it is apparently a significant problem in the federal system, the fact that the state courts handle approximately twenty-five times the number of civil cases as the federal system[34] gives rise to the reasonable conclusion that the problem of unreported opinions in the state courts is substantially greater than it is in the federal system. The instant case is illustrative of just such a problem. This is particularly true where the state courts

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[32] One of the guiding principles for determining publication of opinions is outlined in the Standards for Publication of Judicial Opinions, Federal Judicial Center, Research Series No. 73-2, App. 165a, where it states that: "The Standards For Publication Should Be Promulgated By Rule Of The Highest Court To Govern Its Publication Practice And That Of Courts Under Its Supervision." and, at App. 166a, with respect to publishing judicial opinions where one or more of the listed standards are met. One of those standards is: "The Opinion Lays Down A New Rule Of Law, Or Alters Or Modifies An Existing Rule." Also, those who have considered the reported/unreported opinion problem seem to uniformly agree that judicial opinions relating to new rules of law or opinions altering or modifying an existing rule of law should be published. Maryland, however, has no such standards. See also, A.B.A. Proposed Rule 3.37, App. 168a.

[33] Maryland Rule 8-114 provides, *inter alia*, that the unreported opinion is neither precedent within the rule of *stare decisis* nor persuasive authority. Aside from Maryland Rules 8-113 and 8-114, there are no other rules, policies, procedures or guidelines relating to unreported opinions (see letter from the Clerk of the Court of Appeals of Maryland, App. 105a, the only body charged with rule-making power pursuant to MD. CONST., art. IV, § 18, App. 144a.

[34] DIRECTORY OF STATE COURT CLERKS & COUNTY COURTHOUSES, Want Publishing Co., (1998 ed.), Trends in State Court Litigation, p. 357.

each have varying and different rules[35] from the federal courts, some without any standards as the Maryland Rule[36] relating to unreported decisions. The instant case appears to be the first time where the issue of unreported opinions has been clearly addressed to this Court, in this state court context. It is submitted that the Maryland Rule relating to what opinions are to be reported is plainly discriminatory on its face, so facially vague as to have no meaning, and, it is clearly unconstitutional as applied.

The unreported opinion is the kiss of judicial death to any petitioner or litigant seeking review. It is, sadly, when not properly used, also the kiss of death to *stare decisis* and the legal system as it is taught in law schools and as practitioners know it. As this Court has said in *Payne v. Tennessee*, 501 U.S. 824, 827, 828 (1991), with respect to overruling cases, "*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process. ... ...Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved..."

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[35] A summary of the rules of each of the state courts is found in: Williams, *Survey of State Court Opinion Writing and Publication Practices*, 83 LAW LIBR. J. 21 (1991).

[36] Maryland Rule 8-113 provides that "The Court of Special Appeals shall designate for publication only those opinions that have substantial general interest as precedent." This could mean that the decision on whether to publish a case is determined by whether it sets down a new rule of law; or is frivolous in nature and should not be published; or that the case sets down no new rule of law or does not alter or modify an existing rule of law; or that the case is so poorly written or considered that it does not merit publication; or that the case is inconsistent with an existing opinion on the same facts, reported or unreported and should not, therefore, be published; or that the case relates to state security and should not be published; or that the case relates to juvenile matters that should be protected; etc.; etc.; etc; or that a lawyer litigant may only guess.

Numerous authors, law professors, judges, and attorneys, have commented on the need for rules and guidance for the use of the unreported opinion and how the likelihood for judicial review is diminished because of the judicial opinions' unreported nature and, thus, their applicability only to the litigants in that particular case[37].

In the resolution of this single issue only in the instant case[38], it is submitted that it makes no difference whether or not the decision below was favorable or unfavorable to the petitioners because it is the nature of the opinion, i.e., unreported and applicable to only these litigants, that makes it relevant to the issue of equal protection as argued here. The issue before the state court was clearly a case of first impression in the courts of Maryland. Since the inception of the Regional District Act[39] in 1927, a case of this nature relating to the M–NCPPC changing the zoning map of a property without notice or hearing[40] has never been decided although the facts of the case relate directly to the subject matter of the Regional District Act.

In the review of the classification of cases to be published as found in Maryland Rules 8-113 and 8-114, it is submitted that the classification must rest on some ground of difference having a fair and substantial relation to the object of the rule, *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S.

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[37] At App. 113a is a list of some of the literature that has been reviewed in preparation of this petition. It is respectfully pointed out that this list is only a very small part of the voluminous amount of writings on the subject.

[38] Counsel is not abandoning the other arguments raised in this Petition.

[39] Art. 28, § 1-101, *et seq.*, (Only § 1-101 at App. 146a), of the Annotated Code of Maryland.

[40] It is, however, clearly the law of Maryland that the M–NCPPC does not exercise zoning authority, MD. ANN. CODE, Art. 28, §§ 8-101, 8-104, 8-106, App. 150a—161a. See also, *West Montgomery County Citizens Assoc. v. Maryland-National Capital Park and Planning Commission*, 309 Md. 183, 522 A.2d 1328 (1987) and *Maryland National Capital Park & Planning Commission, et al. vs. Maenette B. Smith, et vir*, 333 Md. 3, 633 A.2d 855 (1993).

522 (1959). Cf. *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1911) and *Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920). In the instant case, it is submitted that the language of the noted rules has no fair and substantial relation to the object of the rule and thus seems to be directed to arbitrarily limiting the number of cases published or reported[41] and that such arbitrary objective of limiting of the number of cases to be published, without more, is not a constitutionally permissible objective. Cf. *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949).

Without reason and without any standard of classification, some landowner litigants in Maryland have their judicial opinions published and some do not and no one is ever aware of any guidelines or standards by which a litigant can guide his actions. Current reported cases from the Maryland Court of Special Appeals clearly show that, with respect to land use litigants with permit problems, there is no particular method or manner of selection or classification of which cases are reported and which are unreported, e.g.: *Esslinger v. Baltimore City*, 95 Md.App. 607, 622 A..2d 774 (1993), *UPS v. People's Counsel for Baltimore County*, 93 Md .App. 59, 611 A.2d 993 (1992), *Sterling Homes Corporation v. Anne Arundel County*, 116 Md. App. 206, 695 A.2d 1238, (1997), *Offen v. County Council*, 96 Md. App. 526, 625 A.2d 424 (1993), *Sykesville v. West Shore Communications, Inc.*, 110 Md. App. 300, 677 A.2d 102, 1996, *County Commissioners of Carroll County*,

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[41] The Minutes of the Meeting of the Court of Appeals Standing Committee on Rules of Practice and Procedure, dated October 11/12, 1985, p. 35, contain the following statement with respect to the adoption of the language (...shall designate for publication only those opinions that have a substantial general interest as precedent.) like that presently found in Maryland Rule 8-113(a), as stated: "Mr. Herrmann noted that current Rule 1092 b [apparently the Rule from which the current Rule was derived] is written in the negative because when this Rule was adopted the Court of Appeals was directing the newly created Court of Special Appeals to keep down the number of opinions published by the latter Court."

Maryland v. The Arundel Corporation, 82 Md. App. 418, 571 A.2d 1270, (1990). The case of *Esslinger, supra*, is particularly significant because that case had all of the issues involved in the instant litigation, namely, 42 U.S.C. 1983, *res judicata*, privity of parties litigant, collateral estoppel, and exhaustion of administrative remedies. Except, however, the instant case is one of first impression[42] where the local zoning body changed the zoning map of the subject property without notice or hearing and then relied on the changed zoning map to deny a building permit, thus a case of first impression before the Maryland Courts. It is submitted that the classification scheme for the publication of opinions by the Maryland Court of Special Appeals[43] is, basically, an imprecise generalization; that as written and as applied, the classification of litigants who have their cases unreported and not cited are basically cut out of the legal process since the determination of the court applies only to them and not to other similarly situated litigants.

It is a laudable purpose to reduce the workload of Courts[44] by reducing the number of reported opinions, "But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they

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[42] Probably because M–NCPPC was not previously motivated or brazen enough except by the instant case where the petitioners were unpopular by having prevailed against M–NCPPC in the administrative appeal case and gone through the entirety of the files and records of the M–NCPPC (with their permission) to find that there was not a single paper, plat, diagram or document of any nature or description in existence at that time that showed the subject property in any zone other than all in the CSC zone.

[43] Found in Maryland Rules 8-113 and 8-114, App. 162a—163a.

[44] In the Court of Special Appeals of Maryland where there is an appeal of right, for the years 1991-1996 there has been an average number of 222.2 reported opinions per year and 1,394.4 unreported opinions per year, for an average number of 13.7% per year of the appeals to the Court of Special Appeals that have reported opinions. These figures are taken from the Annual Report of the Maryland Judiciary for the years listed.

were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.", *Stanley v. Illinois*, 405 U.S. 645, 656 (1972), Cf. *Reed v. Reed*, 404 U.S. 71, 76 (1971) relating to the objective of reducing the workload of the probate courts. Of course, efficiency must never be the primary objective of a free people[45].

It is submitted that this Court should not go beyond the classification specifically stated or outlined in the rule thereby leaving no other purpose than its stated purpose for its existence, see *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949) and *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522 (1959) and that imprecision and generalization without precise legal standards articulated and applied will reduce a supposedly objective standard to the subjective unfettered discretion of the appellate panel. See also, *FCC v. Beach Communications, Inc.*, 508 U.S. 307 (1992) and *Sullivan v. Stroop*, 496 U.S. 478, 485 (1990). Of course, the use of such language does give the state appellate court unlimited latitude in deciding which cases to publish unfettered by any standards.

Under the Court's most deferential standard, the "rational basis" test, it is submitted that it is a denial of equal protection to publish arbitrarily, without rule or reason, some and not other cases relating to landowner litigants. (Particularly where the material facts of their case relate to the first time that a particular section of the law relating to as important a property right, or bundle of property rights, as the zoning of a landowner's property and the right to a building permit is considered by a state appellate court for the first time.) It is submitted that the equal protection clause does not forbid classification, it simply keeps governmental

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[45] Leventhal, *Appellate Procedures: Design, Patchwork, and Managed Flexibility*, 23 UCLA L. REV. 432, 435 (1976), n. 15, Remarks of Chief Justice Warren E. Burger at the ceremonies dedicating the new Law Center, Georgetown University, Sept. 17, 1991.

decision makers from treating differently persons who are in all relevant respects alike and that the protections of the equal protection clause are no less whether the classification is by legislative, judicial, or administrative action, *Nordlinger v. Hahn*, 505 U.S. 1 (1992). See also, *San Antonio Indep. School District v. Rodriguez*, 411 U.S. 1 (1973). It would seem, however, that the right of review of appellate rules of state courts is as much a fundamental right as the right to vote, the right to have access to the courts, and the right to migrate interstate. In effect, as a result of the appellate rules of the Maryland Courts, citizens are unduly denied access to the courts via the unreported opinion route. While it is a legitimate state interest to see that all property is 'properly' zoned before granting a building permit, it is submitted that where the zoning authority has unlawfully changed the zoning of a property , it is not a legitimate state interest to require a rezoning of a citizens property before granting such a permit. Cf. *Dolan v. City of Tigard*, 114 S.Ct. 2309 (1994).

It is submitted that it is a fundamental right of every landowner litigant to have his dispute with the government concerning his zoning, land use, and building permit denial considered fairly by the courts and that he be treated equally as to all other similarly situated landowner litigants. The 2nd CSA unreported opinion effectively bars access to appellate review just as much as an indigent is denied access to the court system where he can't pay the appeal fee. Appellate rules relate to the fabric and core of the judicial system and review of the rules by which every American must ultimately be bound, as in the instant case for example, where the whole 'panoply' or bundle of basic property rights are before the Court.

It is submitted that the language in the case of *Eisenstadt v. Baird*, 405 U.S. 438 (1972) is equally applicable to the instant case where this Court stated at 454:

> "The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the

> principles of law which officials would impose upon a minority must be imposed generally. Consequently, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply the legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation."

III. *Res Judicata*, Estoppel, Detrimental Reliance & Issue of the case

With respect to *res judicata* and collateral estoppel, the law of Maryland is the same as this Court. That is, the parties and those in privity with them are precluded from repetitive litigation on the same issues or issues that could have been raised in the previous litigation, *Warner v. German*, 100 Md.App. 512, 642 A.2d 239 (1994); *Chatman Corporation v. Beltram*, 243 Md. 138, 220 A.2d 589 (1966); *Singer v. Steven Kokes, Inc.*, 39 Md.App. 180, 384 A.2d 463 (1978); *Howard County v. Eberhart*, 58 Md.App. 407, 473 A.2d 509 (1984); *American Surety Co., v. Baldwin*, 287 U.S. 156 (1932); *Arizona v. California*, 460 U.S. 605 (1983); *Montana v. United States*, 440 U.S. 147 (1979); *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981); *Cromwell v. County of Sac*, 94 U.S. 351 (1877); *Grubb v. Public Utilities Comm.*, 281 U.S. 470 (1930), and the case of *Allen v. McCurry*, 449 U.S. 90 (1980) standing for the proposition that *res judicata* and collateral estoppel are available in a 42 U.S.C. 1983 action. Further, the principles of *res judicata* apply to questions of jurisdiction as well as to other issues, *American Surety Co., v. Baldwin*, 287 U.S. 156 (1932).

Of course, the doctrine of *res judicata* and estoppel are designed to prevent repetitive litigation so that it does not

burden scarce judicial resources. Such repetitive litigation is a problem of increasing concern[46].

It is submitted that 'law of the case' is to be distinguished from *res judicata* and estoppel as this Court said that where litigation proceeds along to judgment *res judicata* and estoppel will attach, *Arizona v. California*, 460 U.S. 605 (1983). Further with respect to the doctrines themselves, this Court has stated at 619:

> "Nevertheless, a fundamental precept of common-law adjudication is that an issue once determined by a competent court is conclusive. *Montana v. United States*, 440 U.S. 147, 153, 99 S.Ct. 970, 973, 59 L.Ed.2d 210 (1979); *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981); *Cromwell v. County of Sac*, 94 U.S. 351, 352-353, 24 L.Ed. 195 (1877). 'To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.' *Montana v. United States*, *supra*, 440 U.S. at 153-154, 99 S.Ct., at 973-974.
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> In no contest is this more true than with respect to rights in real property."

Further, the strict rules of *res judicata* "...do not always require one to have been a party to a judgment in order to be bound by it. Most notably, there is an exception when it can be said that there is 'privity' between a party to the second case and a party who is bound by an earlier judgment.", *Richards v. Jefferson Co.*, 116 S.Ct. 1761, 1766 (1996). In the instant case, both Prince George's County and the M–NCPPC are in privity as to all issues decided in both the subdivision case and the administrative appeal case.

It is submitted to the Court that the uncontradicted evidence before the trial court (Judge Johnson), and likewise

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[46] McCoid, II, *supra* note 21 at 12.

before the 2nd CSA, is: (1) that the head of the subdivision office of M–NCPPC and other M–NCPPC employees testified (in the administrative appeal case) that the zoning category of a property is an issue in the subdivision of land; (2) that the preliminary subdivision plat submitted with the preliminary subdivision application has the zoning category of the property listed on it; (3) that the preliminary subdivision application requires the zoning category of the property being subdivided to be listed on it; (4) that the fee for subdivision of land is determined by the zoning category of the property; (5) that the zoning category of the property determines how the subdivision is processed (6) that if there is an error of the zoning category on the subdivision application, someone from M-NCPPC would note it, (7) that M-NCPPC has an employee who does nothing but check and correct any mis-information provided by subdivision applicants; (8) the trial court in the subdivision case referred to the property as being in the commercial zone, App. 119a, last line through 120a, line 2; (9) that the minutes of M–NCPPC relating to the denial of the subdivision application showed that the subject property was in the CSC zone; (10) that the preliminary subdivision plat, App. 126a-127a, approved by court order after denial of the subdivision by M-NCPPC listed "Existing Zone: CSC", item no. 3, App. 127a; (11) that at the time of the approval of the preliminary subdivision plat by the trial court there was not a single piece of paper, plat, plan or other document in existence anywhere including in any file of M-NCPPC that showed the subject property in any zone other than all in the CSC zone; (12) that the Chairman of M–NCPPC approved the subdivision plat of the subject property after court order; (13) that in its brief in the subdivision case, counsel for MNCPPC stated in his Memorandum of Law: "That petitioners herein are the owners of a .5522 acre parcel of land known as Marlboro House and zoned in the C-S-C category ...", such being the entirety of the subject property; (14) and that the subdivision plat of the subject property was recorded (under signature of the Chairman of M–NCPPC) among the land records of Prince George's County. It is

accordingly submitted then that the issue of the zoning of the subject property was appropriately before the trial court in the subdivision case and thus the zoning of the subject property was fully determined therein. Further, M-NCPPC was a party to those proceedings, was represented by counsel and, therefore, they and their privies are bound by that determination. It is submitted that the CSC zoning category of the subject property became the 'law of the case' in all other proceedings relating to the subject property. Additionally, there was the building permit case, i.e., the administrative appeal case[47], where the testimony[48] was under oath, transcribed and is the same as outlined above.

It is submitted that both the subdivision case and subsequent administrative appeal relating to the denial of the building permit are clearly *res judicata* as to both M–NCPPC and Prince George's County, *Burt v. Abel*, 466 F.Supp. 1234 at 1240-1241 (1979) as to *res judicata* and law of the case. Also see, *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322 (1979) supporting the position that collateral estoppel can be used where the party against whom it is sought has had a full hearing and lost.

The summary review of the facts and law of *res judicata* of this case by the 2nd CSA, footnote 1, App. 29a, of its unreported opinion seems to affirm, without reason, that

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[47] There are two cases to which *res judicata*, collateral estoppel and 'issue of the case' applies, (1) the subdivision case, Cir. Ct. for Prince George's County, Maryland, and resolved favorably to the petitioners in *Maenette B. Smith, et vir v. Maryland-National Capital Park & Planning Commission*, CAL 86-12679, and (2) the administrative appeal case, *Maryland National Capital Park & Planning Commission, et al. vs. Maenette B. Smith, et vir*, 333 Md. 3, 633 A.2d 855 (1993), ultimately dismissed thereby leaving the Board of Appeals Order as a final adjudication.

[48] It is respectfully pointed out that all evidence and testimony referred to in this Petition is taken from the files of the Board of Appeals where the testimony was under oath and submitted as an affidavit in these proceedings by the Clerk of the Board of Appeals.

the Board of Appeals decision in *Prince George's County, et al. v. Maenette B. Smit h, et vir*, CAL 91-00205, (Board of Appeals Order at 128a), is neither, *res judicata*, the law of the case, or collateral estoppel with respect to the facts found by the Board of Appeals that M–NCPPC had changed the zoning map of the subject property and had improperly recommended denial of the building permit application. Clearly this is a misapplication of the law.

At all times material hereto, both M–NCPPC and Prince George's County have been in privity with one another, their positions in court have been the same. M–NCPPC and Prince George's County submitted the same brief and they have submitted the same pleadings in some instances, for example at App. 135a-139a, both in the administrative appeal case. In the administrative appeal case after M–NCPPC had been dismissed as a party, Prince George's County was the remaining party. Counsel for M–NCPPC, however, then entered his appearance for Prince George's County after his client, M–NCPPC, had been dismissed as a party. Accordingly, it is submitted that both M–NCPPC and Prince George's were in privity and that the administrative appeal case is *res judicata* to them, the facts being as determined by the Board of Appeals thus becoming final when that appeal was dismissed after being remanded from the Maryland Court of Appeals. Of course, the issues in the administrative appeal case were those decided by the Board of Appeals and their opinion is at App. 128a. At finding No. 12, App. 134a, the Board of Appeals found that **all** of the subject property was in the CSC zoning category when compared to the official zoning map, the only adopted and approved zoning map, the 1977 zoning map.

IV. Temporary Partial Taking – Unconstitutional

This Court has held that a regulatory taking of property that denies all beneficial use for a temporary time is a constitutionally compensable taking, *First English*

Evangelical Lutheran Church v. Los Angeles, 482 U.S. 304 (1987). Likewise, this Court has held that conditioning the grant of a permit on grounds that do not relate to a valid public purpose is an unconstitutional taking and thus compensable, *Nollan v. California Coastal Comm'n.*, 483 U.S. 825 (1987). Cf. *Dolan v. City of Tigard*, 512 U.S. 374 (1994). See also *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). See also, U.S. CONST. amend. V.

Thus, if the M–NCPPC did change the zoning map of the subject property without notice or hearing, the facts of the instant case bring it within the ambit of *Nollan* and *Dolan, supra*, a compensable taking. Of course, the nub of the problem is whether the M–NCPPC changed the zoning map of the subject property. Taking the language of the 2nd CSA on its face that there are no material facts in dispute, then conditioning the grant of the building permit on the application of a special exception or requiring a re-zoning of the subject property is, like the *Nollan* case, a compensable taking since the condition is for something that is not lawfully required because the property was zoned all in the CSC zone as ruled by the Board of Appeals, App. 128a[49], and particularly since the necessity of the conditions imposed were brought about by the original arbitrary and capricious act of M-NCPPC in changing the zoning map of the subject property without notice or hearing[50] as expressly required by statute.

It is submitted that where a governmental entity does what it has no lawful right to do, here change the zoning map of the subject property without notice or hearing, and then relies on the changed zoning map to recommend denial of a building permit, all as the undisputed evidence and facts show here, there is at least a temporary taking that is compensable. The case of *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) established the general principal that "...if

---

[49] See also the numerous items listed above with respect to the argument with respect to *res judicata.*

[50] It is respectfully pointed out to the Court that the 2nd CSA stated that there was no dispute of any material fact.

regulation goes too far it will be recognized as a taking.". It is submitted that an uconstitutional taking does not require a permanent taking or a denial of all reasonable use of property and that it is sufficient that the government has arbitrarily and capriciously interfered with the owner's right to a particular use.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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Attorney for Maenette B.
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*Counsel of Record

(2)

Supreme Court, U.S.
FILED

97 1041 DEC 2 2 1997

OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

MAENETTE B. SMITH, *et vir.*,

Petitioners,

v.

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO
THE COURT OF SPECIAL APPEALS OF MARYLAND

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNREPORTED

IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1430

September Term, 1991

MAENETTE B. SMITH, et vir

v.

MARYLAND NATIONAL CAPITAL
PARK & PLANNING COMMISSION, et al

Bishop, Bloom, Davis, JJ.

Per Curiam

Filed: April 28, 1992

Jess Joseph Smith Jr. and his wife, Maenette B., appeal from a judgment of the Circuit Court for Prince George's County (Bowling J.). The circuit court granted the motions to dismiss filed by each of the three appellees, the Maryland National Capital Park and Planning Commission (MNCPPC), Prince George's County (the County), and the Prince George's County Council, sitting as the District Council, (District Council), because appellants failed to exhaust administrative remedies.

ISSUES PRESENTED

Appellants present four issues, which we have condensed to three:

I. Whether the trial court erred in dismissing the case for failure to exhaust administrative remedies?

II. Whether appellants were entitled to hearing on dispositive motions when requested?

III. Whether the trial court erred in not granting appellants' motion for summary judgment?

FACTS

This case involves two concurrent proceedings that result from the denial of appellants' application for a building permit: an administrative proceeding, and circuit court Case No. CAE 89-24602. This appeal is from the judgment of the circuit court dismissing Case No. CAE 89-24602 for failure to exhaust administrative remedies. We refer to the administrative proceedings and Case No. CAE 89-24602 separately to avoid confusion.

The Administrative Case

Appellants are the owners of approximately one acre of land in Upper Marlboro, Maryland known as Lot One - "Marlborough House" and Lot One - "Content." Part of the property is zoned CSC (Commercial Shopping Center) and part is zoned R-80 (One - Family Detached Residential). The property was originally one lot, but was subidived after the circuit court reversed a decision by MNCPPC that denied appellants' subdivision application. Appellants seek to recreate on the property the historic Marlborough House which was demolished in 1957. In November 1989, appellants filed an application for a building permit with the Prince George's County Department of Environmental Resources ("DER"). On January 24, 1990, DER recommended denial of appellants' building permit application because, according to DER,

the property was in a "split zone", i.e. part in a CSC zone and part in an R-80 zone. Construction of the project was impermissible in an R-80 zone. Appellants appealed to the Prince George's County Board of Appeals (the "Board"). The Board overruled MNCPPC's recommendation and granted appellants' building permit application. MNCPPC appealed the Board's decision to the circuit court, and appellants filed a cross appeal. We are told by appellants in their brief that the circuit court has dismissed MNCPPC as not being a proper aggrieved party and that the case is presently on appeal and cross appeal on the sole issue of whether MNCPPC had a right to appeal the decision of the Board.

Circuit Court Case CAE 89-24602

Before DER acted on appellants' building permit application, appellants, on December 28, 1989, filed a complaint for Declaratory Judgment and Other Relief against MNCPPC in the Circuit Court for Prince George's County. The complaint was amended twice and now also includes as defendants the County and the District Council. By the time appellants' Second Amended Complaint was filed, on November 16, 1990, DER had denied appellants' building permit application. In their Second Amended Complaint appellants alleged that all of Lot One - Marlborough House is in the CSC zone and that MNCPPC and the District Council have "rezoned" the property. In their Second Amended Complaint Appellants stated:

> Defendant, District Council, along with the Defendant, MNCPPC, have rezoned a portion of the property subject to this lawsuit without notice, hearing, or other procedural due process and that such rezoning of your Plaintiffs' property in such a manner is ultra vires, that the Defendants MNCPPC and the District Council are totally without power or auth-

> ority to do what they have done in rezoning or attempting to rezone your Plaintiffs' property by changing the zoning map of the subject property, and that their conduct amounts, inter alia, to an unlawful taking of your Plaintiffs' property and otherwise violate[s] your Plaintiffs' constitutional rights.
>
> That . . . MNCPPC, without notice or public hearing, changed, as aforesaid, the zoning maps of the subject property on two occasions, once on 8-22-88 and once on 3-16-90[.]

In support of these allegations, appellants further alleged that MNCPPC, in connection with the subdivision proceedings, stated in its resolution denying the subdivision application that "Marlborough House" was in the CSC zone and stated in a Memorandum of Law that "Marlborough House" was zoned CSC. Appellants also alleged that the County issued, "without lawful reason," a "stop cutting order" forbidding appellants from cutting trees on their property. Appellants contended "that such an interference with the lawful use of property amount[ed] to a taking or deprivation of property, even for a temporary period of time." Finally, appellants alleged the Town of Upper Marlboro delayed the processing of their building permit in order to subject them to the new county ordinance, effective January 1, 1990, that substantially changed the side yard requirements for properties developed next to historic sites, and which made appellants' project impossible to construct.

Appellants' prayer for relief requested that the court enjoin appellees from "applying or using any zoning map . . . other than the zoning map adopted and approved by the County" and that the court enjoin appellees from "applying or using the zoning, zoning laws, and other laws, ordinances, rules, and regulations . . . other than

the . . . laws . . . that were in effect on 8/22/88, the date the MNCPPC first changed the zoning map of the subject property without notice or hearing." Appellants also requested judgment against appellees in the amount of $2,000,000 plus costs, interest, and attorneys fee[s].

MNCPPC, the County, and the District Council all filed motions to dismiss appellants' complaint. Appellants filed a motion for summary judgment. On April 19, 1991, the circuit court issued an Opinion and Order in the case. The Order was unclear, therefore, on July 16, 1991, the circuit court struck its previous Order and issued another that clearly granted the motions to dismiss filed by all three appellees. The circuit court explained its reason for dismissing appellants' complaint as follows:

> A reading of the Maryland Code reveals that the administrative steps needed for the Plaintiffs to obtain a building permit are exclusive: A permit may not be given except in conformity with the provision of this article and of the regulations enacted by the respective district councils. Md. Ann. Code Art. 28, Section 8-119 (1990). Because the administrative steps to obtain a building permit are exclusive, the administrative remedy is primary. When an administrative remedy is primary, all administrative remedies must be exhausted before invoking ordinary court jurisdiction. *Md. Nat'l Cap. P & P Comm'n v. Crawford,* 307 Md. 1, 511 A.2d 1079 (1986). The Plaintiffs' administrative case is presently proceeding by appeal and they must exhaust that remedy before invoking ordinary court jurisdiction. . . . Because a party seeking a building permit must exhaust their administrative remedies before they can file for mandamus relief, it follows that Plaintiffs must exhaust their administrative remedies before invoking ordinary court jurisdiction.

DISCUSSION

I.

Exhaustion of Administrative Remedies

Appellants contend that the circuit court erred in dismissing Case No. CAE 89-42602 because appellants were not required to exhaust administrative remedies. On appeal to this Court, appellants requested that we remand "to the circuit court for the court to retain jurisdiction pending the final determination of the administrative appeal[.]" For reasons that we will explain, we hold that the circuit court erred in dismissing appellants' complaint; it should have retained jurisdiction over Case No. CAE 89-42602 pending the outcome of the adminintrative case.

In their brief, appellants characterize their Second Amended Complaint as a claim pursuant to 42 U.S.C. §1983. Because the requirements for exhaustion in §1983 cases are different from the requirements in other cases, *see Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982) (cited in *Maryland Nat'l Capital Park and Planning Comm'n v. Crawford*, 307 Md. 1, 12 (1986)), it is crucial to appellants' argument that they have presented a claim under §1983. It is appellees' position that appellants' Second Amended Complaint only "vaguely referred to constitutional violations and alleged a civil rights violation" and that appellants "never alleged a violation of, nor sought relief under 42 U.S.C. §1983."

The Civil Rights Act of 1871, 42 U.S.C. §1983, provides, in pertinent part, as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United

> States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The elements of a §1983 action are defined by federal law. *Ritchie v. Donnelly*, 324 Md. 344, 353 (1991). To state a claim for relief under §1983 a plaintiff must allege that he or she was deprived of some right, privilege, or immunity secured by the Constitution or laws of the United States by a person acting under color of state law. 42 U.S.C. §1983; *Ouzts v. Maryland Nat'l Ins. Co.*, 470 F.2d 790, 792 (1972), *aff'd*, 505 S.Ct. 547 (1974) (en banc), *cert. denied*, 421 U.S. 949 (1975). Local governments are "persons" under §1983. *Ritchie*, 324 Md. at 356; *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 690-95 (1978). When pleading a case in Maryland, the pleader need "only [make] such statements of fact as may be necessary to show the pleader's entitlement to relief[.]" Md. Rule 2-303. Generally, any plain statement of facts necessary to constitute ground of action is sufficient, without reference to mere form. *Shipley v. Meadowbrook Club, Inc.*, 211 Md. 142, 151 (1956). The substance, not the form, of the pleading is the controlling consideration. *Lapp v. Stanton*, 116 Md. 197, 199 (1911).

In the case *sub judice*, appellants' Second Amended Complaint did not specifically state that appellants were proceeding under §1983. The complaint did, however, allege the following:

> MNCPPC, Prince George's County, and the District Council, their officers, agents, and employees, acting in their capacity of and color of law and authority as officers . . . deprived the Plaintiffs of their rights,

> privileges and immunities guaranteed to the Plaintiffs as citizens of the United States and the State of Maryland under the Federal and State Constitutions by, inter alia, rezoning the subject property without notice or hearing and by unlawfully prohibiting the Plaintiffs from cutting trees on their property all thereby taking your Plaintiffs' property without due process and depriving your Plaintiffs of their property, rights, privilegs, and immunities guaranteed to the Plaintiffs as citizens of the United States and the state of Maryland under the Federal and State Constitutions.

The language in the complaint tracks the language of §1983 and is sufficient to allege a cause of action under §1983, even though the complaint did not state on its face that appellants were proceeding under §1983. Appellants have alleged constitutional violations and supporting facts. Appellants alleged that an unconstitutional taking occurred and that their due process rights were violated. In support of these allegations, appellants alleged that appellees illegally "rezoned" their property "without notice or public hearing [by] chang[ing] the zoning maps of the subject property . . . on 8-22-88 and once on 3-16-90" and that appellees prohibited them from cutting trees on their property. Moreover, it is obvious from the language of the complaint, *i.e.* "color of law," "privileges and immunities guaranteed . . . under the . . . Constitution," and the relief requested, *i.e.* injunction and damages, that appellants were asserting a cause of action under §1983. Finally, appellants made it clear to appellees and the court that they were proceeding under §1983 when they stated in their answer to MNCPPC's and the District Council's motions to dismiss that they were making "a claim clearly comprehensible under 42 U.S.C. §1983."

No Maryland court has yet decided whether exhaustion of administrative remedies is a prerequisite to bringing a §1983 action in a state court. The Court of Appeals did discuss exhaustion of administrative remedies in a §1983 case in *Crawford, supra.* In *Crawford,* an employee of MNCPPC, Mrs. Crawford, filed a §1983 action in circuit court alleging racial discrimination while her appeal to the Merit System Board was pending. MNCPPC argued that the circuit court case should be dismissed because Mrs. Crawford had not exhausted her administrative remedies. Relying on *Patsy v. Florida Bd of Regents, supra,* Mrs. Crawford argued that she need not exhaust administrative remedies. MNCPPC attempted to distinguish *Patsy* arguing that it was inapplicable in state court §1983 actions, as opposed to federal §1983 actions. With regard to exhaustion of administrative remedies in §1983 actions the Court of Appeals said:

> In *Patsy v. Florida Board of Regents, supra,* the Supreme Court flatly held as follows: "we conclude that exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to §1983." 457 U.S. at 516, 102 S.Ct. at 2568. While *Patsy* involved a §1983 action brought in a federal court, the majority of state court decisions since *Patsy* have taken the position that the *Patsy* holding is applicable to a state court §1983 action.

Crawford, 307 Md. at 12. (Citations omitted). The Court never reached the question of whether the *Patsy* holding was applicable to state court §1983 actions, however, because it determined that the employee had exhausted her administrative remedies. *Id.* at 15. The *Crawford* Court did offer, however, some guidance with

regard to exhaustion of administrative remedies in state court § 1983 actions. The court stated:

> [W]here there is doubt about the necessity of exhausting administrative remedies, as in this case, one court of action which has been recognized under some circumstances is for the trial court to require exhaustion while also retaining jurisdiction of the matter. This avoids the necessity of commencing the civil action over again should the administrative remedy fail to resolve the dispute.
>
> * * *
>
> [I]n situations . . . where there is both an administrative remedy and an independent judicial remedy (*i.e.*, a special judicial remedy exists other than judicial review of the administrative decision), where the administrative agency may have primary jurisdiction, and where the plaintiff invokes the judicial remedy prior to exhausting the administrative procedures, it has been held that the trial court may retain jurisdiction pending exhaustion of the administrative procedures. Once the administrative procedures are exhausted, the trial court may proceed; the plaintiff whose case is meritorious may be entitled to whatever relief is available under either the independent judicial action or the administrative/judicial review remedy.

Crawford, 307 Md. at 171-18. (Citations omitted).

For the circuit court to require exhaustion while retaining jurisdiction over appellants' § 1983 action is a particularly suitable solution in the case *sub judice*. Here, the Board has determined that appellants are entitled to a building permit. Thus, at least for the time being, appellants have won. MNCPPC has appealed the Board's decision. If the decision of the Board is ultimately reversed, appellants may want to proceed with their

§1983 claim. Should appellants choose to do so, the circuit court could take up the case again at that time. If, however, the decision of the Board is affirmed, appellants will have obtained some of the relief they sought via their §1983 action, and they may choose not to pursue their §1983 claim any further.

II.

At oral argument, counsel for appellants stated he was waiving his argument with regard to appellants' right to a hearing on motions to dismiss and appellants' motion for reconsideration. Therefore, we will not discuss this issue.

III.

Appellants' final contention is that the circuit court erred when it refused to grant appellants' motion for summary judgment. A motion for summary judgment may be granted if there is no dispute as to any material fact and the movant is entitled to judgment as a matter of law. *Century I Joint Venture v. United States Fidelity & Guaranty Co.*, 63 Md. App. 545, 552 *cert. denied*, 304 Md. 297 (1985). Appellant was not entitled to summary judgment in this case because material facts were in dispute. Appellants alleged that appellees "rezoned" their property without notice and a hearing. Appellees, on the other hand, responded that they did not "rezone" appellants' property and that the zoning lines were never changed. What happened, appellees contend, is that appellants made a mistake when they subdivided their property: appellants did not draw the new boundary lines to coincide with the existing zoning lines, and the "split" zoning resulted. Whether a "rezoning" has occur-

red is a disputed question of material fact. Appellants were not, therefore, entitled to summary judgment.

JUDGMENT REVERSED. CASE REMANDED TO THE CIRCUIT COURT FOR PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEES.

APPENDIX B

MANDATE

COURT OF SPECIAL APPEALS

No. 1430, September Term, 1991

Maenette B. Smith et vir

v.

Maryland National Capital Park &
Planning Commission et al.

JUDGMENT: April 28, 1992: Per Curiam filed. Judgment reversed. Case remanded to the circuit court for proceedings consistent with this opinion. Costs to be paid by appellees.

May 18, 1992: Motion to Reconsider to Permit Discovery on Remand filed by appellants.

May 26, 1992: Opposition to Motion to Reconsider to Permit Discovery on Remand filed by counsel for the appellee.

June 16, 1992: Motion to Reconsider to Permit Discovery on Remand denied.

June 22, 1992: Mandate issued.

STATEMENT OF COSTS:

In Circuit Court: for PRINCE GEORGE'S COUNTY
CAE89-24602

Record	50.00
Stenographer Costs	219.00
* Total *	269.00 *

In Court of Special Appeals:

Filing Record on Appeal	50.00	
Printing Brief for Appellant	147.60	
Reply Brief	43.20	
Portion of Record Extract – Appellant	2199.60	
* Total *		2440.40 *
Printing Brief for Appellee	158.40	
* Total *		158.40 *

STATE OF MARYLAND, Sct:

I do hereby certify that the foregoing is truly taken from the records and proceedings of the said Court of Special Appeals. In testimony whereof, I have hereunto set my hand as Clerk and affixed the seal of the Court of Special Appeals, this twenty-second day of June A.D. 1992

/s/ Leslie D. Gradet
Clerk of the Court of Special Appeals

COSTS SHOWN ON THIS MANDATE ARE TO BE SETTLED BETWEEN COUNSEL AND *NOT THROUGH THIS OFFICE.*

APPENDIX C

[Filed April 17, 1996]

IN THE
CIRCUIT COURT FOR
PRINCE GEORGE'S COUNTY, MARYLAND

CAE89-24602

MARNETTE SMITH, et vir.

Plaintiffs

v.

MARYLAND NATIONAL CAPITAL PARK
AND PLANNING COMMISSION, et al.,

Defendants

MEMORANDUM AND ORDER OF COURT

This case comes before the Circuit Court for Prince George's County for a hearing on the Plaintiffs' Motion for Partial Summary Judgment on the Issue of Liability. The defendants in this matter have also submitted individual cross-motions for summary judgment. Plaintiffs Maenette Smith and Jess J. Smith (the Smiths) ask this Court to rule favorably on their motion and to find all defendants, the Maryland National Capital Park and Planning Commission (the M-NCPPC), the Prince George's County Council, sitting as the District Council (the District Council), and Prince George's County, Maryland (the County), liable for damages.

I.

In 1986, the Smiths purchased an undivided parcel of land near Church Street in Upper Marlboro, Maryland,

which was zoned part R-80 residential and part C-S-C commercial. In 1987, the Smiths subdivided the parcel into Lot 1-Content and Lot 1-Marlborough House. Lot-1-Content, zoned all residential, has the Smiths' private residence on it and is not part of this action. Lot 1-Marlborough House, on the other hand, was dual-zoned at the time this action was instituted and is the subject of the proceedings before the Court.

In 1989, the Smiths applied to for a building permit to develop Lot 1-Marlborough House. Their application was forwarded to the M-NCPPC for review and recommendation. The M-NCPPC reviewed the plats and found that part of the land was zoned C-S-C commercial and the other was zoned R-80 residential. The agency requested the Smiths to correct the dual-zoning. The Smiths took no remedial measures to alleviate the dual zoning so the M-NCPPC recommended that Department of Environmental Resources (the DER) deny the application for a building permit.

In January 1990, the DER advised the Smiths in writing of the M-NCPPC's recommendation to deny their building permit application and encouraged them to contact the M-NCPPC about correcting the dual-zoning of Lot 1-Marlborough House. Rather than contacting the M-NCPPC to remedy the dual-zoning as directed, the Smiths filed this lawsuit in December 1989 seeking damages and other relief. Therein the Smiths claimed that the M-NCPPC rezoned Lot 1-Marlborough House without notice or hearing. In an amended complaint, the Smiths claimed that M-NCPPC's actions constituted a government taking of Lot 1-Marlborough House.

In June 1993, however, the Smiths made a written request for the M-NCPPC to include Lot 1-Marlborough House in the Sectional Map Amendment process so that

the lot could be rezoned entirely C-S-C commercial. In May 1994, the County Council adopted the proposal for Lot 1-Marlborough House and rezoned the Smiths' property entirely C-C-C commercial. The plaintiffs were subsequently issued a building permit for their property.

II.

On March 4, 1996, this Court heard the movants' argument in favor of Partial Summary Judgment as to Liability. Mr. Smith argues that there is no genuine dispute as to any material fact in this case and therefore the plaintiffs are entitled to judgment as a matter of law. Namely, he asserts that the M-NCPPC changed certain base maps and rezoned the Smiths' property without authority to do so and without public notice and hearing. By acting in this unauthorized manner, the M-NCPPC caused the Smiths' building permit to be significantly delayed and caused the Smiths to incur damages in developing their property. He also asserts that such delay constitutes a government taking.

Last, Mr. Smith argues that the issue of whether Lot 1-Marlborough House was zoned completely C-S-C commercial is res judicata because the matter has already been litigated in one of the many related cases.

The Court also heard argument from the M-NCPPC opposing the Plaintiffs' Motion for Partial Summary Judgment as to Liability and in favor of its own Cross-Motion for Summary Judgment. The thrust of the agency's argument is that it has the authority to update base maps which it maintains, including any map which may have affected the plaintiffs' real property. Maintenance of base maps may not be construed as arbitrary rezoning of property without hearing or notice. If the plaintiffs did sustain any damage as a result of the zoning

designation of their property, the M-NCPPC is not liable for such damages.

The M-NCPPC likewise argues that the actions of the agency did not constitute a government taking. Rather, the Smiths harmed themselves by failing to remedy zoning discrepancies for their property. The Smiths' own actions, not those of the M-NCPPC, caused significant delay in them being issued a building permit. The agency reviewed the plaintiffs' record plats for Lot 1-Marlborough House and recommended denial of the building permit application to the District Council because of dual-zoning. Such recommendation was not arbitrary but based solely on the agency's authority to render such recommendation.

III.

Preliminarily, the District Council and the County are dismissed as defendants in this matter. Neither had any substantive role in the current zoning dispute sub judice. The M-NCPPC, however, remains as a defendant for the purpose of disposition of summary judgment.

Having reviewed the facts of this case, the Court declines to grant the Smiths' Motion for Partial Summary Judgment as to Liability. However, the Court does grant the M-NCPPC's Cross-Motion for Summary Judgment. The Court's reasoning is set out below.

A.

Summary judgment may be granted where the movant meets the burden of demonstrating that there is no genuine dispute as to any material fact. Md. R. Civ. Proc. 2-501; *Willis v. Allstate Ins. Co.*, 88 Md. App. 21, 25, 591 A.2d 896 (1991) (citations omitted). Upon review of all the pleadings and affidavits, and upon hearing the arguments presented, this Court finds that the Smiths have

not met that burden with regard to their Motion for Partial Summary Judgment as to Liability and are not entitled to judgment as a matter of law.

Namely, where the Smiths contend that it is an undisputed fact that the M-NCPPC rezoned Lot 1-Marlborough House without authority, the Court finds that this assertion is based on a misstatement of the facts. The Court rejects the plaintiffs' contention that by virtue of the M-NCPPC updating certain base maps, the agency overstepped its authority and somehow caused the Smiths' property to be dual-zoned. It is clear that the M-NCPPC is authorized to maintain and update base maps for property in Prince George's County, Maryland. Md. Ann. Code art. 28 §7-111.

Upon examination of the facts, it seems that the M-NCPPC updated certain base maps of the property to reflect subdivision and other changes. However, the agency acted well within its authority to update base maps and simply carried out its duty in this regard. Contrary to the Smiths' representations regarding the effect of the M-NCPPC updating base maps, the Court finds that the agency did not cause Lot 1-Marlborough House to be dual-zoned.

The Court finds that the M-NCPPC has demonstrated that there is no genuine dispute as to any material fact. Therefore, the defendant is entitled to judgment as a matter of law. The Smiths assert that the M-NCPPC rezoned their property without authority by updating certain base maps. However the M-NCPPC has shown that the agency has complete authority to update those maps because one of the several functions of the agency is to update maps for all property in Prince George's County. Md. Code Ann. art. 28 §7-111. Moreover, merely updat-

ing these maps does not result in unauthorized rezoning of property by the agency.

For the Court to deny the M-NCPPC summary judgment, the Smiths must show that there is indeed a genuine dispute as to any material fact and that such evidence would likely be admissible into evidence. *See Beatty v. Trailmaster*, 330 Md. 726, 737, 625 A.2d 1005, 1010-11 (1993) (citations omitted). However, the Smiths have not met that burden in any respect. Rather, the Smiths' arguments are based only on misstatements and misleading permutations of the facts.

B.

Contrary to the Smiths' assertions, the Court also declines to find that there has been a government taking. The plaintiffs allege that because of certain delays in being granted a building permit, they have been the victims of a government taking. However, the pleadings, affidavits, and arguments presented do not support this allegation.

For there to be a government taking, the complaining landowner must have been deprived of all beneficial use of his or her land. *Cider Barrel Mobile Home Court v. Eader*, 287 Md. 571, 580, 414 A.2d 1246 (1980); *Security Management Corp. v. Baltimore County, Md.*, 104 Md. App. 234, 243, 655 A.2d 1326 (1995). That is not the case here. The Smiths were not deprived of all beneficial use of their land merely because they were denied a building permit to construct commercial buildings on Lot 1-Marlborough House. Denial of the permit resulted only in the Smiths not being able to use the land as they intended, not that they could not use the land at all. Moreover, when the M-NCPPC recommended denial of the Smiths' application for a building permit, the agency was merely executing its charge to make such recom-

mendations to the DER and nothing more. The Smiths' property was dual-zoned and did not conform with certain of the County's plans and policies. Therefore, no building permit could be granted unless they took corrective measures to have it uniformly zoned.

The Court also fails to find that a taking occurred merely because the Smiths experienced a delay in obtaining a commercial building permit. A crucial element of a government taking is that the property owner is deprived of the use of his or her land. *Id.* However, to equate self-imposed delay with deprivation at the hands of the government is wholly disingenuous. As the facts of this case show, although the Smiths were prompted by the M-NCPPC to correct the dual zoning on their land shortly after applying for a building permit in 1989, they failed to take any such remedial measures. Rather, the Smiths chose to file a lawsuit and as such experienced significant delay awaiting a judicial hearing on the matter.

Moreover, the Smiths waited nearly four years to submit a request to the M-NCPPC that their land be rezoned. Such request was later adopted by the County Council and a building permit was issued. If the Smiths were somehow deprived of the use and enjoyment of their land during this delay, it was not because of any unauthorized rezoning by the M-NCPPC but because of the Smiths' own acts in failing to correct the dual zoning on their property.

C.

Neither is the Court persuaded that the zoning designation of the Smiths' property is res judicata. In order to raise res judicata properly, it must be shown that there was final judgment on the merits in the initial action. *Warner v. German*, 100 Md. App. 512, 518, 642

A.2d 239 (1994). Moreover, the party to the case must also have been able to appeal the judgment. *Id.* at 521. The Smiths rely on one of the many cases related to the one sub judice, and its antecedent Board of Appeals case, to illustrate that the C-S-C commercial zoning designation of Lot 1-Marlborough House is res judicata. *Maryland Nat'l Capital Park and Planning Comm'n v. Smith*, 333 Md. 3, 11, 633 A.2d 855 (1993). However, the requisite elements to properly assert res judicata are absent. In the appellate case, the Court dismissed the M-NCPPC as a party because the agency had no standing and did not reach the merits of the dispute. *Id.* Because the zoning designation of the property was never litigated, res judicata as to that issue may not be properly asserted.

THEREFORE, it is this 10th day of April, 1996, by the Circuit Court for Prince George's County, Maryland,

ORDERED, that the Plaintiffs' Motion for Partial Summary Judgment be, and it is hereby, DENIED;

IT IS FURTHER ORDERED that the Maryland National Capital Park and Planning Commission's Motion for Summary Judgment be, and it is hereby, GRANTED;

AND THAT Prince George's County, Maryland and the Prince George's County Council sitting as the District Council, are DISMISSED as defendants in these proceedings.

/s/ G.R. Hovey Johnson
Judge

Copies sent by the Court to:

Jess Joseph Smith, Jr., Esq.
Eric S. Slatkin, Esq.
Joyce Birkel Nichols, Esq.
Isaac H. Marks, Esq.
J. Michael Dougherty, Jr., Esq.
Assignment Office - Civil Division

/s/ Charlotte S. Hagen
Exec. Administrative Aide
April 10, 1996
RRG:rrg:csh

APPENDIX D

UNREPORTED

IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 927

September Term, 1996

MAENETTE B. SMITH, et vir.

v.

MARYLAND NATIONAL CAPITAL
PARK AND PLANNING COMMISSION, et al.

Wenner, Davis, Eyler, JJ

Per Curiam

Filed: April 14, 1997

Appellants, Maenette B. and Jess Joseph Smith, Jr. (the Smiths), appeal from an order of the Circuit Court for Prince George's County, granting summary judgment in favor of appellee, Maryland National Capital Park and Planning Commission (MNCPPC) and dismissing appellees, Prince George's County (the County), and the Prince George's County Council sitting as the District Council (Council). On appeal, the Smiths present us with a panoply of issues, which we have consolidated and rephrased for clarity:

(1) whether the circuit court erred in granting MNCPPC's motion for summary judgment;

(2) whether the circuit court erred in denying the Smiths' motion for summary judgment; and

(3) whether the circuit court properly dismissed the County and the Council as defendants.

Finding no error, we shall affirm the judgment of the circuit court.

Facts

The present appeal is the culmination of nearly a decade of disputes between the Smiths and the County's various agencies dealing with zoning matters. We will discuss such disputes as necessary. The Smiths own a parcel of land consisting of two lots, designated as 14520 Church Street in Upper Marlboro. Until 1986, the parcel was zoned both R-80 (residential) and C-S-C (commercial).

In 1987, the Smiths subdivided the parcel into two lots. The one designated as Lot 1-Content, was zoned R-80.[1] The other, designated as Lot 1-Marlborough House (the Property), was purportedly zoned C-S-C. The subdivision was recorded by MNCPPC on the base maps maintained by it pursuant to Art. 28 §111.[2]

In 1989, the Smiths applied to the County's Department of Environmental Resources (DER) for a building permit, intending to construct an office building on the Property. Pursuant to Section 27-255 of the Prince George's County Zoning Ordinance (Ordinance), the application was referred to MNCPPC for review.

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[1] Lot 1-Content is not involved in this appeal.

[2] A base map consists of geographical data such as property boundary lines, streets and roads, while a zoning overlay map consists of land use zones and zoning boundary lines. A combined zoning base map and a zoning overlay map create a zoning map.

Upon reviewing the Smiths' application, MNCPPC realized that a portion of the Property was zoned R-80 and a portion was zoned C-S-C.[3] Consequently, MNCPPC advised the Smiths to apply for a special exception to permit parking on the portion of the Property zoned R-80 (residential). MNCPPC also advised the Smiths that issuance of a building permit could not be recommended until an application had been submitted. Accordingly, MNCPPC recommended denial of the building permit.

In 1990, MNCPPC offered, at its expense, to have the Property surveyed in order to correct its zoning status, but the Smiths declined MNCPPC's proposal. There were two methods to correct the Property's zoning. One was to file a zoning map amendment pursuant to section 27-143 of the Ordinance. The other was to file a sectional map amendment pursuant to section 27-220 of the Ordinance.

The Smiths eventually chose the second method. As a result, the Property was zoned C-S-C, effective 24 May 1994.

The Smiths' application for a building permit was then approved both by MNCPPC and DER. Nonetheless, damages were sought by the Smiths for what they perceived to be a taking of the Property during the period they were unable to obtain a building permit. All parties moved for summary judgment. Following a hearing, the Smiths' motion was denied, and that of MNCPPC was granted. The County and the Council were dismissed as defendants. This appeal followed.

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[3] Apparently, this split zone was the result of an incorrect subdivision by appellants, as appellants failed properly to subdivide the property along the zoning line. As a result, a portion of the Marlborough lot continued to be located in the R-80 zone, and not entirely in the C-S-C zone as appellants had desired.

Standard of Review

The Smiths principally contend that the circuit court erred in denying their motion for summary judgment and granting that of MNCPPC. According to the Smiths, the circuit court improperly determined that the Property was zoned both R-80 and C-S-C upon applying for a building permit. According to the Smiths, MNCPPC had improperly changed the zoning map. We disagree.

"The standard for appellate review of a trial court's grant of a motion for summary judgment is simply whether the trial court was legally correct." *Beatty v. Trailmaster Prods., Inc.*, 330 Md. 726, 737, 625 A.2d 1005 (1993). Maryland Rule 2-501(e) provides that:

> the court shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law.

Not only is one opposing a motion for summary judgment entitled "to have the facts viewed in light most favorable to it but also to all reasonable inferences which may be drawn from those facts . . . (citations omitted). The inferences the non-moving party seeks to draw, however, must be 'reasonable'. . . ." In other words, "the party opposing the motion is to be given the benefit of all reasonable doubts in determining whether a genuine issue exists." *Clea v. Mayor of Baltimore*, 312 Md. 662, 678, 541 A.2d 1303 (1988). In determining whether material facts are in dispute, neither the "mere existence of a scintilla of evidence in support of the plaintiff's claim" nor "general allegations which do not show facts in detail and with precision" are sufficient. *Beatty*, 330 Md. at 738.

With these principles firmly in mind, we now turn to the issues before us.

I.

We agree with the Smiths and MNCPPC that there are no material facts in dispute. What is in dispute, however, is whether the Smiths' are entitled to damages. In the Smiths' view, the delay in receiving a building permit entitles them to damages. The Smiths advance two theories in support of their position.

a.

The first is that their delay in obtaining a building permit resulted in a taking of the Property, because they were unable during this period to erect an office building on the Property. We see it somewhat differently.

"While all government regulations affecting private property restrict the owner's use and enjoyment to some extent, not all such regulations result in a "taking" in the constitutional sense. (Citations omitted.) It is not enough for the owner to show that the regulations cause a diminution in value or other hardship. If they leave the owner in substantial enjoyment of the property, they do not constitute a "taking." (Citations omitted.) Thus, regulations which restrict the use and enjoyment of property, but which nonetheless permit an existing use to continue, generally do not constitute a "taking" because they leave the owner with some beneficial use of the property. (Citations omitted.) Regulations generally constitute a "taking" only if the owner affirmatively demonstrates that the restrictions imposed deprive him of essentially all beneficial use of the property." *Cider Barrel Mobile Home Court v. Eader*, 287 Md. 571, 580, 414 A.2d 1246 (1980) (citations omitted). That is not what has occurred.

Although the Smiths were unable during this period to erect an office building on the Property, they were not deprived of all use of the Property. As the Property was zoned R-80 during the course of the dispute, the Property could have been employed as property zoned R-80. Thus, the Smiths' assertion that the period during which they were denied a building permit constituted a taking is without merit. Moreover, the Smiths' have presented no evidence of their assertion that the delay was the result of any wrongdoing by MNCPPC.

b.

The Smiths also contend they are entitled to damages because of MNCPPC's failure to approve the granting of a building permit. According to the Smiths, they were denied a building permit because MNCPPC improperly changed the base maps and rezoned the Property without authority to do so and without a hearing. To be sure, MNCPPC updated the base map which includes the Property, but Art. 28, §7-111 grants it authority to do so. Thus, MNCPPC's failure initially to approve the Smiths' building permit was neither improper nor entitled the Smiths to damages.

As the trial court said in its order denying the Smiths' motion for summary judgment and granting that of MNCPPC, MNCPPC had neither acted improperly nor beyond its authority in denying the Smiths' building permit.[1]

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[1] The Smiths believe *Prince George's County v. Maenette Smith*, CAL 91-00205, renders this issue *res judicata*. This assertion is misplaced, however, as MNCPPC had merely updated the base maps. As we have said, Art. 28, §7-111 granted MNCPPC authority to do so, and it doing so does not entitle the Smiths to damages for any delay which may have resulted.

Before being updated by MNCPPC, the Property was zoned both R-80 and C-S-C. Hence, it was incumbent upon the Smiths to correct the zoning if they desired to obtain a building permit. We have earlier noted that, although it was not obligated to do so, MNCPPC endeavored on several occasions to assist the Smiths in obtaining a building permit, even offering to have the Property surveyed at its own expense, to correct the zoning problem. The Smiths, however, rebuffed all of MNCPPC's attempts to resolve the matter diplomatically, choosing instead to proceed in the courts. Consequently, it seems disingenuous for the Smiths to claim damages from MNCPPC for the delay in obtaining a building permit. There was no error.

II.

Finally, the Smiths contend that the circuit court erred in dismissing the County and the Council as defendants. We again disagree. MNCPPC has authority in the County to prepare and maintain zoning maps. In sum, it was appropriate for the circuit court to dismiss the County and the Council as defendants.

JUDGMENT AFFIRMED.

COSTS TO BE PAID
BY APPELLANTS.

APPENDIX E

[Filed May 27 1997]

IN THE COURT OF APPEALS OF MARYLAND

Petition No. 178

September Term, 1997

MAENETTE B. SMITH, et vir

Petitioners,

vs.

MARYLAND NATIONAL CAPITAL PARK AND PLANNING COMMISSION, et al.

Respondents.

PETITION for WRIT of CERTIORARI

COMES NOW the Petitioners, Maenette B. Smith, et vir, by and through their attorney, Jess Joseph Smith, Jr., and file this Petition for Writ of Certiorari, and say, with reference, seriatim, to Maryland Rule 8-303:

1. The reference to the action in the lower court by name and docket number: In the Circuit Court for Prince George's County, Maryland, *Maenette B. Smith, et vir v. Maryland National Capital Park and Planning Commission, et al.*, CAE 89-24602; In the Court of Special Appeals, *Maenette B. Smith et vir v. Maryland National Capital Park and Planning Commission, et al.*, No. 927, September Term 1996.

2. The case has been decided by the Court of Special Appeals (herein 'CSA') with that Court's opinion attached hereto.

3. The Circuit Court has adjudicated all claims in the action in their entirety, and the rights and liabilities of all parties to the action by way of Summary Judgment.

4. The date of the judgment sought to be reviewed in the Circuit Court was April 10, 1996, and the date of the Mandate of the Court of Special Appeals was May 14, 1997.

5. The questions presented for review are:

I. WHETHER OR NOT A LAND USE APPELLANT IS DENIED DUE PROCESS OR EQUAL PROTECTION UNDER THE U.S. CONSTITUTION, THE MARYLAND CONSTITUTION, OR THE MARYLAND DECLARATION OF RIGHTS WHERE THE ISSUE OF LAW DETERMINED DOES NOT APPLY EQUALLY TO ALL SIMILARLY SITUATED LAND USE APPELLANTS OR LITIGANTS?

II. WHETHER OR NOT A LOCAL GOVERNMENT'S CHANGING THE ZONING MAP OF A LANDOWNER'S PROPERTY WITHOUT NOTICE OR HEARING, WHEN SUCH NOTICE AND HEARING IS REQUIRED BY LAW TO CHANGE ANY ZONING MAP, AND THE LOCAL GOVERNMENT'S SUBSEQUENT RELIANCE ON THE CHANGED ZONING MAP TO DENY A BUILDING PERMIT TO THE PROPERTY OWNER CREATES LIABILITY FOR DAMAGES UNDER 42 U.S.C. 1983?

III. WHETHER OR NOT THE LOWER COURT ERRED IN FINDING THAT THE PRIOR FINAL ADJUDICATION OF THE SUBDIVISION OF THE SUBJECT PROPERTY AND THE FINAL DECISION OF THE ADMINISTRATIVE APPEAL CASE RELATING TO THE BUILDING PERMIT

DENIAL OF THE INSTANT CASE WERE NOT RES JUDICATA AS TO THE MATERIAL ISSUES ON LIABILITY PURSUANT TO 42 U.S.C. 1983?

IV. WHETHER OR NOT THE LOWER COURT ERRED IN FINDING THAT A PROPERTY OWNER MUST BE DEPRIVED OF ALL BENEFICIAL USE OF HIS PROPERTY OR THAT THE DENIAL OR DELAY OF A BUILDING PERMIT FOR A PERIOD OF TIME OF APPROXIMATELY FIVE (5) YEARS WAS NOT A GOVERNMENTAL TAKING OF PROPERTY, A DENIAL OF PROCEDURAL DUE PROCESS, OR A DEPRIVATION OF ANY RIGHTS, PRIVILEGES, OR IMMUNITIES SECURED BY THE CONSTITUTION AND LAWS AND CREATES LIABILITY FOR DAMAGES UNDER 42 U.S.C. 1983?

V. WHETHER OR NOT THE LOWER COURT ERRED IN GRANTING THE CROSS-MOTION FOR SUMMARY JUDGMENT FILED BY THE MNCPPC?

VI. WHETHER OR NOT THE LOWER COURT ERRED IN DENYING THE PETITIONERS' MOTION FOR PARTIAL SUMMARY JUDGMENT?

VII. WHETHER OR NOT THE LOWER COURT ERRED IN DISMISSING, WITHOUT REASON, PRINCE GEORGE'S COUNTY AS A PARTY?

6. A reference to pertinent constitutional provisions, statutes, ordinances, or regulations: U.S. CONSTITUTION, 14th Amendment; 42 U.S.C. 1983; MARYLAND DECLARATION OF RIGHTS, Articles 23, 24; ANNOTATED CODE of MARYLAND, Article 28, §§7-111, 8-101, 8-104, 8-106, 8-119; MARYLAND RULE 8-114; PRINCE GEORGE'S COUNTY CODE, §27-255(a)(1).

7. A concise statement of the facts material to the consideration of the questions presented:

THESE FACTS ARE NOT IN DISPUTE:

A. The Petitioners were the owners of property on Church Street in Upper Marlboro, Maryland since 1997.

B. The only zoning map that was adopted and approved by the District Council at the time of filing this case and at the time of filing of the application for building permit was the zoning map dated 7/12/77.

C. When the Petitioners acquired the subject property, it was undivided with part of the property in the CSC zone and part in the R-80 zone and the Petitioners desired to subdivide the property to construct a small office building solely on the CSC zoned portion of their property.

D. Since the zoning map of the subject property, dated 7/12/77, was not clear with respect to zoning lines, one of the Petitioners took the zoning map to the appropriate official at the MNCPPC to clarify the map and to get direction with respect to subdividing the property so that the small office building could be constructed on the parcel of property that would be all in the CSC zoned portion of the property to be subdivided.

E. The official of the MNCPPC advised the Petitioner how the lot should be subdivided, making notes on the zoning map that is in evidence in this case, and the advice was followed by the Petitioners, so that the newly created subdivision, Lot One, Marlborough House, would be all in the CSC zone.

F. The Petitioners relied on the representation of the MNCPPC official and spent a substantial amount of

money in preparing a preliminary subdivision plat to submit to the MNCPPC showing the boundaries and zoning of the entirety of the subject property.

G. The zoning of the property to be subdivided is an issue in the subdivision process. It is a requirement of the MNCPPC that the property boundaries and the zoning of the subject property be included on the preliminary subdivision plat (submitted with the written application for subdivision approval) because, among other reasons, it determines the amount of the fee for processing the plat as well as the internal processing and review of the preliminary subdivision plat by the MNCPPC and the preliminary subdivision plat is assigned a specific number designation by the MNCPPC.

H. The MNCPPC denied the subdivision request for, among other reasons, that the property was next to a house on the National Historic Register and that the Petitioners failed to donate or give some of their property to the widening of Church Street; notwithstanding there was no plan in existence or contemplated to widen Church Street.

I. The Circuit Court for Prince George's County, upon appeal of the subdivision denial to that court, granted the subdivision of the Petitioners specifically noting in the Order the specific number designation of the preliminary plat that was approved by the Court that had the boundaries of the subject property fixed thereon and the designation showing that all of the property was in the CSC zone. This case was not appealed by either party.

J. The subdivision plat, as approved by the Circuit Court, was approved by the MNCPPC on 2/18/88, and was recorded among the land records of Prince George's County at Liber 137, Plat 54.

K. That in further reliance on the appropriate governmental official of the MNCPPC, the Petitioners expended in excess of $100,000.00 cash out of pocket of their own money in the subdivision and development of the subject property for architect, engineering, surveying, soil borings, financing, bonds, and other miscellaneous expenses, to get to the position of obtaining a building permit by complying with all of the requirements of Prince George's County for a building permit.

L. That on 8/22/88 and on 3/16/90, subsequent to the building permit application, the MNCPPC, without notice or hearing, changed the zoning map of the subject property thereby making part of the subject property, that is, Marlborough House, Lot One, in the CSC and R-80 zones.

M. That the MNCPPC reviewed the building permit application of the Petitioners and recommended denial of the permit based on the zoning map of 8/22/88, since the newly created lot, Marlborough House, Lot One, was partially in the CSC zone and partially in the R-80 zone. At the hearing before the Board of Appeals, the representative of the MNCPPC testified that the denial of the building permit was based on the zoning maps of 8/22/88 and 3/16/90.

N. The Denial of the building permit application was not based on any adopted and approved zoning map, nor was the denial based on the 7/12/77 zoning map.

O. That the instant lawsuit was filed shortly after the Petitioners found out that the MNCPPC had changed the zoning map and was recommending denial of the building permit application based on the changed zoning map of 8/22/88 that was changed without notice or hearing.

P. That the denial of the building permit was appealed by the Petitioners and the Board of Appeals for Prince George's County, Md., (Board of Appeals) found that the MNCPPC had changed the boundaries of the subject property thereby creating more than one zone for the subject property.

Q. That, at the hearings before the Board of Appeals, the MNCPPC was the principal party other than the Petitioners and the MNCPPC submitted all of the evidence against the Petitioners at the Board of Appeals hearing. That the MNCPPC and the Petitioners appealed the decision of the Board of Appeals and the MNCPPC was dismissed as not being an 'aggrieved party'. After being dismissed from the case, counsel for the MNCPPC continued as the attorney for Prince George's County over objection of the Petitioners.

R. That on 11/16/90, the Chief, Permit Section, Construction Standards Division, Department of Environmental Resources, Prince George's County, Maryland, certified under affidavit that the Petitioners had complied with all of the requirements of the County Code for the issuance of a building permit except for the approval of the MNCPPC.

S. That prior to the Circuit Court Order approving the preliminary subdivision plat application showing the boundaries of the property and the CSC zoning of the subject property of the Petitioners, there was not a single piece of paper in the files of the MNCPPC or elsewhere that showed or indicated that the subject property, Lot, One, Marlborough House, was in any zone other than all in the CSC zone.

T. That there has not been a single reported Maryland case from the Court of Special Appeals or the Court

of Appeals since the inception of the MNCPPC in 1927 that permits or authorizes the MNCPPC to change a zoning map, nor any case that permits a change in a zoning map without notice or hearing.

U. That a zoning map in Prince George's County is composed of a 'base map' and a transparent 'zoning overlay' that contains only zoning boundaries. That the zoning overlay is placed over the base map and copied thereby forming a zoning map.

V. That the only governmental body in Prince George's County that is empowered to adopt, approve, and make any changes to a zoning map is the District Council (the County Council for Prince George's County, Maryland, sitting as the District Council [District Council]) and then only after notice and hearing.

W. That the MNCPPC is not empowered or authorized to make any changes to zoning maps in Prince George's County.

X. There is no evidence or reference to any fact in evidence presented in this case relating to the MNCPPC assisting the Petitioners in obtaining the requested building permit or asking to re-survey the Petitioners' property or permit the MNCPPC to do so without expense except that, after one of these cases had been on appeal and during an argument before the Circuit Court, Counsel for the MNCPPC offered to have the property re-surveyed without cost to the Petitioners and the Petitioners declined since the property had been surveyed previously, that the Circuit Court had previously approved the subdivision of the subject property showing the boundaries of the subject property and all of the subject property being in the CSC

zone, that the MNCPPC had approved such subdivision in writing after Court Order, the plat was recorded among the land records of Prince George's County, and that there was a deed recorded among the land records of Prince George's County certifying the boundary between the property to the north of the subject property and the subject property that settled a boundary dispute between a previous owner of the subject property and the property to the north of the subject property, and that the Petitioners had spent a substantial sum of money in relying on the representation of the proper governmental official of the MNCPPC in subdividing their property.

Y. That the building permit for the subject property was granted on 10/26/94 after the SMA was enacted by the District Council showing all of the subject property in the CSC zone.

Z. The MNCPPC made changes to the base maps and zoning maps that effect the subject property.

THESE FACTS ARE IN DISPUTE:

A. Whether or not the Petitioners applied for a rezoning of their property by way of the SMA.

BRIEF SUMMARY of EACH CASE RELATING to the DEVELOPMENT of the SUBJECT PROPERTY, Exhibit 'A', attached.

8. A concise argument in support of the petition.

BACKGROUND[1]

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[1]This case could be titled: "More Than You Ever Wanted to Know About Base Maps and Zoning Maps." or "The Case of the Bogus Zoning Maps.".

Both the Circuit Court[2] and the Court of Special Appeals[3] have erroneously assumed, as a matter of fact, that the subject property was zoned in a dual zone when this case was filed and when the building permit application was filed. The uncontradicted facts are to the contrary. That the MNCPPC changed the zoning map without notice or hearing has never been is dispute – the MNCPPC (also as found by the Board of Appeals) has stated that they changed the base map thereby changing the zoning map of the subject property when the zoning overlay transparency was put over the changed base map thereby creating a new and changed zoning map. Also, there is no dispute that there was no notice or hearing prior to the changing of the zoning map by the MNCPPC. It is the clearly the law that the MNCPPC does not exercise zoning authority, Art. 28, § § 8-101, 8-104, 8-106. See also, *West Montgomery County Citizens Assoc., et al. v. Maryland-National Capital Park and Planning Commission, et al.*, 309 Md. 183, 522 A.2d 1328 (1987).

Certainly, if you make the assumption that the subject property was dual zoned when the building permit was applied for, then there is no other factual determination that needs to be made and the case is then decided as the trial court and the CSA have decided it.

Both the Circuit Court[4] and the CSA[5] erroneously

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[2]Memorandum and Order of Court (top of page 2 of its Order), Under paragraph 'I', in the first paragraph, last sentence, of the Court stated, ". . . Lot 1 - Marlborough House, on the other hand, was dual-zoned at the time this action was instituted and is the subject of the proceedings before the Court.".

[3]At footnote 3, page 2, and at page 6, first sentence of the last paragraph.

[4]At page 6, first full paragraph, last two sentences.

[5]At page 6, first two full paragraphs.

equate the power to maintain and update base maps under Art. 28, §7-111, with the power to make any changes to zoning maps under Art 28, §§8-101, 8-104, and 8-106.

It is submitted that this is the first case in Maryland where the Courts have sanctioned the MNCPPC changing a zoning map clearly contrary to Art. 28, §§8-101, 8-104, and 8-106. It is also submitted that this is a case of first impression in the State of Maryland where MNCPPC changed a zoning map without notice or hearing. It is further submitted that this is a case of first impression where a zoning map that has been changed without notice or hearing by the MNCPPC contrary to Maryland law has been used to deny a building permit.

I.

WHETHER OR NOT A LAND USE APPELLANT IS DENIED DUE PROCESS OR EQUAL PROTECTION UNDER THE U.S. CONSTITUTION, THE MARYLAND CONSTITUTION, OR THE MARYLAND DECLARATION OF RIGHTS WHERE THE ISSUE OF LAW DECIDED DOES NOT APPLY EQUALLY TO ALL SIMILARLY SITUATED LAND USE APPELLANTS OR LITIGANTS?

Maryland residents and litigants are entitled to the equal protection of the laws of the state and the laws of the land through Art. 14 of the U.S. Constitution and the Art. 24 of the Maryland Declaration of Rights. *Kirsch, et al. v. Prince George's County, Maryland,* 331 Md. 89, 626 A.2d 372 (1993), cert. denied, – U.S. –, 114 S.Ct. 600, 126 L.Ed.2d 565 (1963).

Equal protection means treating litigants equally unless there is some rational or reasonable basis for classifying or distinguishing between them. *Avery v. State,* 15 Md. App. 520, 537, 292 A.2d 728 (1972), citing *Eggleston v. State,* 209 Md. 504, 121 A.2d 698 (1956).

Where grouping or classification is without reasonable basis or entirely arbitrary, it is forbidden, *Potomac Sand and Gravel Co. v. Governor of Maryland, et al.*, 266 Md. 358, 376, 293 A.2d 241 (1972), rephrasing the Supreme Court in *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 55 L.Ed. 369 (1911).

Maryland Rule 8-114, it is submitted, is just such a forbidden classification of litigants with no reasonable or rational basis for the classification and, thus, is a denial of equal protection for the litigants who are unlucky enough to have their case 'unreported'.[6] The absence of any classification renders the noted Maryland Rule unconstitutional as a violation of an appellant's equal protection. The noted Rule contains no basis whatsoever for determining the class of reported or unreported decisions and is, thus, in a constitutional sense, an arbitrary classification.

In the instant case, the decision of the CSA is unreported and, as such pursuant to Maryland Rule 8-114, it is not authority for this or any other land use appellants or litigants. The Petitioners are treated differently from other similarly situated land use appellants who have reported opinions in their disputed cases.

In the sense that Rule 8-114, as applied to the facts of this case[7], denies these land use appellants equal treat-

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[6]Counsel could find no rules or guidelines for determining when a case would be 'unreported' and a telephone call to the Clerk of the CSA confirmed that there are no written rules or policy other than the Maryland Rule. It is significant to note that the Petitioners have had three (3) 'unreported' opinions in the development of their land.

[7]The Petitioners recognize that there are appropriate cases for unreported opinions, among others, juvenile cases, national and state security interests, etc., but there is no such classification that Petitioners could find.

ment with other land use appellants, it is unconstitutional. The net effect of the instant case is to change the law of Maryland with respect to changing zoning maps but have it only applicable to one person, your Petitioners. It is submitted that such single application is a violation of the Petitioners' due process or equal protection.

The Court of Special Appeals, by its unreported opinion. sanctions or permits the MNCPPC changing the zoning map of a landowner's property after the landowner had expended more than $100,000.00 in reliance on a proper governmental representative and notwithstanding the clear language of Art. 28, §§8-101, 8-104 and 8-106, that provide that only the District Council can make 'any' change to a zoning map and then only after notice and a hearing. The Court, by its unreported opinion, then sanctions or permits the governmental agency to use the changed zoning map to deny a building permit application.

There are a large number of other land use applicants for building permits in Maryland where such land use building permit applicants have had their cases heard and determined in reported opinions[8] while the instant litigants have not been so lucky.

To decide some land use cases in reported opinions and some land use cases in unreported opinions does not, it is submitted, provide equal treatment of the two similarly situated land use litigants, particularly where there are no rules or regulations determining whether or not an opinion is 'unreported'.

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[8]There appear to be thirty-one (31) such reported cases involving "building permit denial zoning" as determined from the CD-ROM of Maryland Cases as provided by Michie, attached as Exhibit 'B'. There are innumberable reported land use cases relating to zoning.

If the CSA is going to change the land use law of the state of Maryland, it is submitted that then the Petitioners and other landowners are entitled to rely on the changed law; however, the unreported opinion does not permit the instant or other landowners to do so in other cases, because the instant opinion is 'unreported'.

Further, permitting the trial court to make a determination of the facts of this case is[9], it is submitted, a violation of the Petitioner's due process rights secured by Art. 23 of the Maryland Declaration of Rights, that provides that issues of fact in civil proceedings shall be determined by a jury[10].

II.

WHETHER OR NOT A LOCAL GOVERNMENT'S CHANGING THE ZONING MAP OF A LANDOWNER'S PROPERTY WITHOUT NOTICE OR HEARING, WHEN SUCH NOTICE AND HEARING IS REQUIRED BY LAW TO CHANGE ANY ZONING MAP, AND THE LOCAL GOVERNMENT'S SUBSEQUENT RELIANCE ON THE CHANGED ZONING MAP TO DENY A BUILDING PERMIT TO THE PROPERTY OWNER CREATES LIABILITY FOR DAMAGES UNDER 42 U.S.C. 1983?

The Annotated Code of Maryland, Art 28, §8-104, clearly requires a notice and hearing before *any changes* are made to a zoning map. Counsel for the MNCPPC has repeatedly stated that the MNCPPC does not have the power to change zoning maps notwithstanding the facts of this case.

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[9] Principally by assuming or otherwise determining that the subject property was dual zoned at the outset of the case, that is, whether or not the MNCPPC changed the zoning of the subject property.

[10] It is respectfully pointed out to the Court that this case was stayed and remanded to the Circuit Court for a determination of whether or not the MNCPPC changed the zoning map.

It is submitted that the witness who was designated by the MNCPPC to testify before the Board of Appeals for Prince George's County (herein Board of Appeals) concerning the MNCPPC recommended denial of the Petitioner's building permit application testified that the zoning maps were changed and that the changed zoning maps were used to recommend denial of the building permit application. Likewise, the Clerk of the District Council testified that the only adopted and approved zoning map (at that time) was the zoning map of 7/12/77. There was no notice or hearing of such change. 42 U.S.C. 1983 is clearly applicable to the counties, and such conduct as not following procedures outlined in the law is clearly compensible under 42 U.S.C. 1983. A property owner, under 42 U.S.C. 1983, has the right to procedural due process before his property may be rezoned, *Harris v. County of Riverside,* 904 F.2d 497 (CA 9 Cal) (1990).

The principal of substantive due process protects property owners in zoning dispute cases from arbitrary or irrational zoning actions under 42 U.S.C. 1983, like that involved in the instant case, *Brady v. Colchester,* 883 F.2d 810 (CA 9 Cal) (1989).

III.

WHETHER OR NOT THE LOWER COURT ERRED IN FINDING THAT THE PRIOR FINAL ADJUDICATION OF THE SUBDIVISION OF THE SUBJECT PROPERTY AND THE FINAL DECISION OF THE ADMINISTRATIVE APPEAL CASE RELATING TO THE BUILDING PERMIT DENIAL OF THE INSTANT CASE WERE NOT RES JUDICATA AS TO THE MATERIAL ISSUES ON LIABILITY PURSUANT TO 42 U.S.C. 1983?

The first case between the Petitioners and the MNCPPC, the subdivision case, *Maenette B. Smith, et*

vir v. Maryland National Capital Park & Planning Commission, CAL 86-12679, in the Circuit Court for Prince George's County, Maryland, is now final. It is submitted that the issue of the zoning and boundaries of the lot in question, the Marlborough House, Lot One, has been determined and is res judicata at least between the MNCPPC and its privy, Prince George's County, and the Petitioners.

The administrative appeal case, *Prince George's County, et al. v. Maenette B. Smith, et vir,* CAL 91-00205, was an appeal of the Board of Appeals decision finding that the MNCPPC had changed the zoning map of the subject property and finding that all of the subject property was in the CSC zone[11]. It is significant to note that the date of the dismissal of the administrative appeal case was some three (3) years after the unreported decision in the instant case on April 28, 1992, because that case, the administrative appeal case, did not become final, and thus res judicata, until after it was dismissed on March 14, 1995. The Board of Appeals decision relating to the development of the subject property from which the administrative appeal was taken became final, and thus res judicata as to Prince George's County, and its privy the MNCPPC.

As pointed out in *Warner, et ux. v. German, et al.,* 100 Md.App. 512, 642 A.2d 239 (1994), the prior adjudication is binding on parties and their privies – here Prince George's County and the MNCPPC whose legal positions were, and are, the same and they were ultimately represented by the same counsel.

The doctrine of res judicata is clearly applicable to administrative agencies, *Chatman Corporation v. Belt-*

[11] Finding #12 of the Board of Appeals decision attached hereto.

ram, 243 Md. 138, 220 A.2d 589 (1966), as here, where the original subdivision case, *Smith, '86 case, supra,* related to the drawing of boundary lines as does the instant case and to the administrative agency, the Prince George's County Board of Appeals (that statutory body charged with the expertise to hear and decide these type cases), found that the MNCPPC had, in fact, changed the adopted and approved zoning map of the subject property. See also, *Singer v. Steven Kokes, Inc.,* 39 Md.App. 180, 384 A.2d 463 (1978), for the proposition that the previous decision between the same parties is final as to all matters that were raised or could have been raised. In accord, *Howard County v. Eberhart,* 58 Md.App. 407, 473 A.2d 509 (1984).

IV.

WHETHER OR NOT THE LOWER COURT ERRED IN FINDING THAT A PROPERTY OWNER MUST BE DEPRIVED OF ALL BENEFICIAL USE OF HIS PROPERTY OR THAT THE DENIAL OF A BUILDING PERMIT FOR A PERIOD OF TIME APPROXIMATELY FIVE (5) YEARS WAS NOT A GOVERNMENTAL TAKING OF PROPERTY, A DENIAL OF PROCEDURAL DUE PROCESS, OR A DEPRIVATION OF ANY RIGHTS, PRIVILEGES, OR IMMUNITIES SECURED BY THE CONSTITUTION AND LAWS AND CREATES LIABILITY FOR DAMAGES UNDER 42 U.S.C. 1983?

This action by MNCPPC and the County is clearly an unwarranted interference with the beneficial use and enjoyment of the Petitioners' property amounting to a taking, and, although the taking may be of a temporary nature or partial nature, it is, nevertheless a taking. *First Evangelical Lutheran Church of Glendale v. Los Angeles,* 107 S.Ct. 2378 (1987). *Donohoe v. MNCPPC,* 398 F. Supp. 21 (1975). *Keystone v. DeBenedeictis,*

107 S.Ct. 1232 (1987). *Shapiro v. Chapman,* 70 Md. App. 307, 520 A.2d 1330 (1987).

A taking may occur even though the owner is not deprived of substantially all beneficial use of the property as the Court of Special Appeals held in, *QC Corp. v. Maryland Port Admin.,* 68 Md.App. 181, 510 A.2d 1101 (1986). And conditioning a use of property (as here in requiring the Petitioners to rezone the subject property to CSC to put all of the subject property in the CSC zone as a condition precedent to getting their building permit) which does not further a governmental purpose is not permitted and is a taking in the constitutional sense, *Nolan v. California Coastal Com'n.,* 107 S.Ct. 3141 (1987). See also, the 14th Amendment, Section 1, to the U.S. Constitution and Article 24 of the Maryland Declaration of Rights, and *Corn v. City of Lauderdale Lakes,* 771 F. Supp. 1557 (S.D. Fla. 1991); *Westbrough Mall, Inc. v. City of Girardeau, MO,* 953 F.2d 345 (8th Cir. 1991); *Herrington v. County of Sonoma,* 79 F. Supp. 909 (N.D. CA 1991); and *Front Royal and Warren County Industrial Park v. Town of Front Royal,* 749 F. Supp. 1439 (W.D. VA 1990). Even temporary regulatory taking of property rights are compensible in a 42 U.S.C. 1983 action, *Wheeler v. Pleasant Grove,* 833 F.2d 267 (CA 11 Ala) (1987).

V.

WHETHER OR NOT THE LOWER COURT ERRED IN GRANTING THE CROSS-MOTION FOR SUMMARY JUDGMENT FILED BY THE MNCPPC?

As stated above under 'Background', both the lower court and the trial court have erroneously assumed that the property was dual zoned when the building permit was applied for and, therefore, there is no need for the Courts to do anything else except to find for the

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MNCPPC and the County. There are also statements that the Petitioners have failed to take any action to correct their zoning problem and that their delays are self-imposed. It is submitted that such statements go only to the issue of damages and not to the issue of liability under 42 U.S.C. 1983 and reduces the Petitioners' damages because the building permit has now been issued.

It is respectfully pointed out that the zoning power and the power to change or amend zoning maps in Prince George's County is exercised exclusively by the County Council for Prince George's County, Maryland, sitting as the District Council, as outlined in the Annotated Code of Maryland, Article 28, as outlined below: Article 28, Annotated Code of Maryland (1995 Replacement Volume) [emphasis added]

§8-101. Powers generally.

(a) Designation of district councils; bi-county district council. – The County Councils of Montgomery County and Prince George's County are each individually designated, for the purposes of this article, as the district council for that portion of the regional district lying within each county, respectively. . . .

(b) Grant of zoning power. –

. . . (2) . . . each district council, respectively, in accordance with the conditions and procedures specified in this article, may by ordinance adopt and amend the text of the zoning ordinance and may by resolution or ordinance adopt and amend the map or maps accompanying the zoning ordinance text to regulate, in the portion of the regional district lying within its county, ... and (vi) the uses of land, . . .

* * * * *

§8-104. Amendments to zoning regulations – Generally.

(a) Authorized procedure. –

(1) After duly advertised public hearing each district council from to time may amend its regulations or any regulation, including the maps or any map, in accordance ith procedures established in the respective zoning ordinances. . . .

* * * * *

§8-106. Same – Hearings and appeals in Prince George's County.

. . . (d) Definitions for sections. – for purposes of this section and §§8-104 and 8-105 of this article herein, the word "amend" or "amendment" shall be deemed to include any modification of the text or phraseology of a regulation or of any provision of the regulations, or any repeal or elimination of any regulation or part thereof, or any addition to the regulations, or any new regulation, or any change in the number, shape, boundary, or area of the districts, or of any district, or any repeal or abolition of any map or part thereof, or any addition to any map, or any new map, or any other change in the map or maps. . . . .

The language of the statute is clear and unambiguous, *Richmond v. State,* 326 A.2d 257, 262, 604 A.2d 483 (1992), and, it is submitted, and requires notice and a hearing of any change in zoning map.

VI.

WHETHER OR NOT THE LOWER COURT ERRED IN DENYING THE PETITIONERS' MOTION FOR PARTIAL SUMMARY JUDGMENT?

In addition to the reasons stated above in 'Background', the following reasons are submitted to the Court.

CLAIM or ISSUE PRECLUSION

The issue of the zoning of the subject property was clearly an issue in the consideration of the preliminary subdivision plat and in the subdivision case, as testified to by the Mr. Hirsch, Head of the Subdivision Office of the MNCPPC. It would seem that re-litigating that issue would be precluded at least by the doctrine of claim or issue preclusion, *Kent County Bd. of Educ., et al. v. Bilborough,* 309 Md. 487, 489-490, 525 A.2d 232 (1987).

DIRECT or COLLATERAL ESTOPPEL

The MNCPPC and Prince George's County cannot now come into Court to contest a matter that was, or could have been, raised in the previous cases between the same parties, that is, the zoning map and building permit issues in the Board of Appeals case (*Maryland National Capital Park & Planning Commission, et al. vs. Maenette B. Smith, et vir,* 333 Md. 3, 633 A.2d 855 (1993), same case as *Prince George's County, et al. v. Maenette B. Smith, et vir,* CAL 91-00205, in the Circuit Court for Prince George's County, Maryland), *Klein v. Whithead,* 40 Md.App. 1, 389 A.2d 374 (1978). See also *Beatty v. State,* 56 Md.App. 627, 468 A.2d 663 (1983), where the court indicated that the doctrine of collateral estoppel applies where the second case is between the same parties but on different causes of action as here the *Smith, '86 case, supra,* relating to the MNCPPC denial of the subdivision request and the '91 case relating to the appeal of the denial of the building permit application as cited in this paragraph above.

Likewise, it would be inequitable to permit the Appellees to now repudiate their prior representations where the Petitioners have relied on that conduct much to their detriment, *Realty Improvement Association, et al. v.*

Sycamore Realty Co., Inc., 105 Md. App. 701, 661 A.2d 182 (1995). See also, *County Council of Prince George's County, Maryland v. Offen*, 334 Md. 499, 639 A.2d 1070 (1994), and *Washington Suburban Sanitary Commission, et al. v. TKU Associates et al. v. Montgomery County, Maryland, et al.*, 281 Md. 1, 376 A.2d 505 (1977).

It is submitted that when Mr. James H. Carr, Chief, Permit Section, Construction Standards Division, Department of Environmental Resources, Prince George's County, Maryland, gave his affidavit on 11/16/90 that the Petitioners had then fully complied with all requirements for a building permit, **except for the known bogus zoning maps** that were relied on by the MNCPPC and the County in the denial of the building permit, the building permit should have been granted since the Petitioners had, at that time, satisfied **ALL** of the statutory requirements for a building permit.

REPRESENTATION by GOVERNMENTAL EMPLOYEE

It is unquestionably the law of the State of Maryland that an individual may rely on the representation of a governmental official where, as here, the governmental official was the proper person to make such representation. *Gontrum v. Mayor and City Council of Baltimore*, 182 Md. 370, 35 A.2d 128 (1943). See also, *White v. County Commissioners of Washington Co.*, 227 Md. 573, 177 A.2d 905 (1962).

VII.

WHETHER OR NOT THE LOWER COURT ERRED IN DISMISSING, WITHOUT REASON, PRINCE GEORGE'S COUNTY AS A PARTY?

It is difficult to state the reasons for the trial court dismissing Prince George's County since Prince George's County is the party who denied the building permit, particularly, since the lower courts did not give any reasons for their decision.

In Prince George's County, the County itself is the governmental body that controls the issuance of building permits pursuant to Article 28, §8-119 and the County is required to refer the review of the permit applications to the MNCPPC pursuant to the Prince George's County Code, §27-255(a)(1).

9. All of the documents required by Maryland Rule 8-303(b)(2) are attached hereto.

10. It is **Desirable** for this court to hear this case by certiorari for the following reasons: The appellate courts of the State of Maryland have decided important questions of federal law that have not been, but should be decided; The appellate courts of the State of Maryland have decided an important federal question in a way that conflicts with relevant decisions of the U.S. Supreme Court.

11. It is **In the Public Interest** for this court to hear this case by certiorari for the following reasons: Similarly situated land use litigants should be able to rely on the established law of the state of Maryland: Similarly situated land use litigants should be able to rely on all of the opinions of the Appellate Courts of the State, not just the reported ones; To instill confidence in the Judicial system of the State by treating all similarly situated appellants with the same law and rules.

CONCLUSION

THIS IS REALLY A VERY SIMPLE CASE EVEN THOUGH IT TAKES UP REAMS OF PAPER AND MANY FILES. YOUR PETITIONERS WOULD BE FORTUNATE TO HAVE THE COURT ADDRESS, AND GIVE A REPORTED OPINION ON, ONLY ONE ISSUE: WHETHER OR NOT THE MNCPPC CHANGED THE ZONING MAP OF THE SUBJECT PROPERTY WITHOUT NOTICE OR HEARING?[12] (THIS IS THE ISSUE FOR WHICH THE CASE WAS REMANDED TO THE CIRCUIT COURT IN THE FIRST PLACE.) IF THE MNCPPC DID NOT CHANGE THE ZONING MAP WITHOUT A NOTICE OR HEARING, THEN THE CASE SHOULD BE DISMISSED. IF THE MNCPPC DID CHANGE THE ZONING MAP OF THE SUBJECT PROPERTY WITHOUT NOTICE OR HEARING, THEN THE CASE SHOULD BE REVERSED AND REMANDED TO THE CIRCUIT COURT FOR A JURY TRIAL ON DAMAGES.

FOR THE FOREGOING REASONS, IT IS RESPECTFULLY REQUESTED THAT THE COURT GRANT THIS PETITION FOR WRIT OF CERTIORARI.

/s/ Jess Joseph Smith, Jr.
Jess Joseph Smith, Jr.
P.O. Box 1995
Upper Marlboro, MD 20773
(301) 627-8200

[Certificate of Service Omitted in Printing]

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[12] It is respectfully pointed out that the Petitioners are not withdrawing or abandoning any other issues raised herewith but are merely suggesting to the Court an easy way to resolve all of the issues by looking at a single set of uncontradicted facts in this case.

[EXHIBIT 1]

BRIEF SUMMARY of EACH CASE RELATING
to the DEVELOPMENT of the SUBJECT PROPERTY

I. 1/14/87 – '86 case – **SUBDIVISION CASE** – This case related to the denial of the subdivision of the property by the Maryland National Capital Park & Planning Commission (MNCPPC), and is referred to as the 'subdivision case' and the '86 case'[1] This case was resolved favorably to the Plaintiffs (Petitioners here) in *Maenette B. Smith, et vir v. Maryland National Capital Park & Planning Commission,* CAL 86-12679, in the Circuit Court for Prince George's County, Maryland. The final subdivision plats were approved by the MNCPPC on 2/18/88 for 'Lot One, Marlborough House' and was recorded among the Land Records of Prince George's County, Maryland, at Liber NLP 137, Plat 54[2]. The Court Order in the subdivision case expressly approved the Preliminary Subdivision Plat No. 4-86100, 'Lot One, Marlborough House'[3] showing the boundaries of the property with the notation "Existing zone: CSC", that is, all of the subject property was in the CSC zone. The subdivision case was not appealed further by either party.

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[1]The denial was based, inter alia, on the subject property being adjacent to a home that was on the National Historic Registry and the failure of the Petitioners to give or donate property for a widening of Church Street.

[2]The northern boundary of the subject property had been settled in 1968 by a Deed of Agreement to Establish Boundary Line and also recorded among the Land Records of Prince George's County, Maryland.

[3]The 'Preliminary Subdivision Plat' is the name of the plat filed with the application for subdivison plat approval.

II. 12/27/89 – '89 case – DAMAGES CASE – CAE 89-24602. The instant case started as a Declaratory Judgment case with damages and jury damand. The case was later amended for injunctive relief and later to its present posture for only damages with jury demand. This case was filed after the Petitioners had been notified that their building permit application would be denied based on a zoning map that had been changed by the MNCPPC without notice or hearing. This case was dismissed by the trial Judge for, inter alia, failure to exhaust administrative remedies and was reversed and stayed by the Court of Special Appeals in No. 1430, Sept. Term 1992, in an **unreported opinion** filed April 28, 1992. This case was remanded to the Circuit Court pending the outcome of the Administrative Appeal case, the then pending '91 case, for a determination of whether or not the MNCPPC had rezoned the Petitioner's property, a question of disputed material fact, since at that time the administrative appeal case was not final. Since the Appellants now have their building permit, they are no longer seeking injunctive relief but are merely seeking damages. On remand, the trial court dismissed Prince George's County as a party, granted the Summary Judgment of the MNCPPC, and denied the Summary Judgment of the Petitioners. In an **unreported opinion** filed April 14, 1997, the CSA affirmed the trial court.

III. 12/27/90 – '90 case – MANDAMUS CASE – *Maenette B. Smith, et vir v. Prince George's County, Maryland,* in the Circuit Court for Prince George's County, Maryland, CAL 90-30619. This case was filed to compel the issuance of the building permit after the Board of Appeals decided the administrative appeal in the favor of the Petitioners and the County stated that they would not issue the building permit without court order.

This case was dismissed by the trial Court for failure to exhaust administrative remedies since the administrative appeal case was then pending. This case was affirmed by the Court of Special Appeal in No. 1654, Sept. Term 1991, in an unreported opinion. The Court of Appeals denied cert. in Petition Docket No. 431, Sept. Term 1992.

IV. 1/3/92 – '91 case – ADMINISTRATIVE APPEAL – This was an administrative appeal case and is referred to as the 'administrative appeal case' and the '91 case', *Prince George's County, et al. v. Maenette B. Smith, et vir,* CAL 91-00205. This case was an appeal of the Board of Appeals decision finding in favor of the Petitioners that the MNCPPC had changed the zoning map of the subject property. The case was appealed by all parties here, namely the MNCPPC, Prince George's County, and the Petitioners. The Petitioners here appealed to preserve, inter alia, the issues of res judicata relating to the subdivision case and reliance on a governmental official and direct or collateral estoppel in the administrative appeal case. This case went to the Court of Appeals that, sua sponte, granted certiorari and affirmed the trial Court in a reported opinion, *Maryland National Capital Park & Planning Commission, et al. vs. Maenette B. Smith, et vir,* 333 Md. 3, 633 A.2d 855 (1993), filed Dec. 8, 1993, and dismissed the MNCPPC as an appellant inasmuch as the MNCPPC was not an aggrieved party although the MNCPPC appeared and vigorously defended its position before the Board of Appeals and all courts. This case went back to the Circuit Court for trial[4]

[4]Where counsel for the MNCPPC, although MNCPPC had been dismissed as a party, nevertheless remained as co-counsel for Prince George's County, Maryland, over objection, and later entered his appearance as co-counsel individually using the MNCPPC address.

and was dismissed before trial by Order dated March 14, 1995, when the newly enacted Sectional Map Amendment showed the entirety of the subject property as zoned CSC and since the building permit had been issued on October 26, 1994. This administrative appeal case is now final.

V. 3/11/93 – '93 case – U.S. DISTRICT COURT– This was a case by your Petitioners for damages under 42 U.S.C. 1983 in the Federal District Court in Baltimore, Case No. MJG 93-742. This case was dismissed by the Petitioners on Sept. 28, 1993.

[EXHIBIT 'B']

"BUILDING PERMIT DENIAL ZONING"

1 + 677 A.2d 102, 110 Md. App. 300 TOWN OF SYKESVILLE V. WEST SHORE COMMUNS, INC. (Ct. Sp. App. 1996)

1 + 650 A.2d 226, 336 Md. 569 UPS V. PEOPLE'S COUNSEL FOR BALTIMORE COUNTY (Ct. App. 1994)

1 + 639 A.2d 1070, 334 Md. 499 COUNTY COUNCIL OF PRINCE GEORGE'S COUNTY V. OFFEN (Ct. App. 1994)

2 + 633 A.2d 855, 333 Md. 3 MARYLAND-NATIONAL PARK & PLANNING COMM'N V (Ct. App. 1993)

1 + 625 A.2d 424, 96 Md. App. 526 OFFEN V. COUNTY COUNCIL FOR PRINCE GEORGE'S COUNTY (Ct. Sp. App. 1993)

1 + 622 A.2d 774, 95 Md. App. 607 ESSLINGER V. BALTIMORE CITY (Ct. Sp. App. 1993)

2 + 611 A.2d 993, 93 Md. App. 59 UPS V. PEOPLE'S COUNSEL FOR BALTIMORE CTY. (Ct. Sp. App. 1992)

1 + 571 A.2d 1270, 82 Md. App. 418 COUNTY COMMRS. OF CARROLL CTY. V. ARUNDEL CORP. (Ct. Sp. App. 1990)

1 + 428 A.2d 879, 290 Md. 214 FAULKNER V. TOWN OF CHESTERTOWN (Ct. App. 1981)

1 + 331 A.2d 55, 273 Md. 486 CRIMINAL INJURIES COMP. BD. V. GOULD (Ct. App. 1975)

2 + 314 A.2d 436, 271 Md. 42 LOGAN V. TOWN OF SOMERSET (Ct. App. 1974)

1 + 291 A.2d 672, 266 Md. 117 ROCKVILLE FUEL & FEED CO. V. CITY OF GAITHERSBURG (Ct. App. 1972)

1 + 214 A.2d 810, 240 Md. 547 SALISBURY BD. OF ZONING APPEALS V. BOUNDS (Ct. App. 1965)

1 + 212 A.2d 751, 240 Md. 77 BEALL V. MONTGOMERY COUNTY COUNCIL (Ct. App. 1965)

4 + 198 A.2d 267, 234 Md. 145 LEVY V. SEVEN SLADE, INC. (Ct. App. 1964)

1 + 182 A.2d 34, 229 Md. 142 REISKIN V. COUNTY COUNCIL FOR MONTGOMERY CTY. (Ct. App. 1962)

1 + 172 A.2d 523, 226 Md. 204 CITIES SERV. OIL CO. V. BOARD OF COUNTY COMM'RS OF (Ct. App. 1961)

1 + 151 A.2d 726, 220 Md. 263 KESELING V. MAYOR OF BALTIMORE (Ct. App. 1959)

1 + 137 A.2d 708, 215 Md. 294 STATE HOUS., INC. V. MAYOR OF BALTIMORE (Ct. App. 1958)

1 + 137 A.2d 198, 215 Md. 206 MARINO V. MAYOR OF BALTIMORE (Ct. App. 1957)

1 + 126 A.2d 621, 211 Md. 172 HARDESTY V. BOARD OF ZONING APPEALS OF BALTIMORE C (Ct. App. 1956)

1 + 123 A.2d 207, 210 Md. 199 MAYOR OF BALTIMORE V. SEABOLT (Ct. App. 1956)

1 + 114 A.2d 608, 207 Md. 424 HUTZLER V. MAYOR OF BALTIMORE (Ct. App. 1955)

1 + 105 A.2d 482, 204 Md. 523 CITY OF BALTIMORE V. COHN (Ct. App. 1954)

1 + 101 A.2d 826, 203 Md. 506 BENSEL V. MAYOR OF BALTIMORE (Ct. App. 1954)

1 + 93 A.2d 74, 201 Md. 130 CARNEY V. CITY OF BALTIMORE (Ct. App. 1952)

1 + 87 A.2d 589, 199 Md. 602 BRUNING BROS. V. MAYOR OF BALTIMORE (Ct. App. 1952)

1 + 78 A.2d 765, 197 Md. 266 NUOVA REALTY CO. V. MAYOR OF BALTIMORE (Ct. App. 1951)

1 + 75 A.2d 91, 196 Md. 77 FRANCIS V. MACGILL (Ct. App. 1950)

1 + 60 A.2d 743, 191 Md. 171 NORTHWEST MERCHANTS TERM., INC. V. O'ROURKE (Ct. App. 1948)

3 + 57 A.2d 346, 190 Md. 6 BENNER V. TRIBBITT (Ct. App. 1948)

[For the following documents, see the pages listed:

- Judge Johnson's Memorandum and Order of Court, April 10, 1996 at 15a.
- Opinion (2d CSA), unreported, Filed April 14, 1997 at 24a.
- Opinion (1st CSA), unreported, Filed April 28, 1992 at 1a.
- Board of Appeals Decision re: Building Permit Denied, Dec. 20, 1990 at 128a.]

APPENDIX F

IN THE
COURT OF APPEALS OF MARYLAND

Petition Docket No. 178

September Term, 1997

(No. 927, September Term 1996,
Court of Special Appeals)

MAENETTE B. SMITH et vir.

v.

MARYLAND NATIONAL CAPITAL
PARK AND PLANNING COMMISSION et al

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals, and the answer filed thereto in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert M. Bell
Chief Judge

Date: AUG 22 1997

APPENDIX G

[Filed October 15 1997]

IN THE
COURT OF SPECIAL APPEALS OF MARYLAND

September Term 1996
No. 927

MAENETTE B. SMITH, et vir
Appellants

vs.

MARYLAND NATIONAL CAPITAL
PARK & PLANNING COMMISSION, et al.
Appellees

PETITION for EXTRAORDINARY RELIEF
and
STATEMENT of GROUNDS and AUTHORITIES

Comes now the Appellants, Maenette B. Smith, et vir, as tenants-by-entirety (referred to as the 'Smiths) for clarity because there are multiple cases referred to herein), by and through their attorney, Jess Joseph Smith, Jr., and, pursuant to Maryland Rule 8-431, file this Petition for Extraordinary Relief and Statement of Grounds and Authorities, and say:

JURISDICTION

1. This Court has jurisdiction of the instant matter, and for the relief prayed, such jurisdiction being found in the Maryland Constitution, Article IV, Section 1; the Maryland Declaration of Rights, Article 5; the Annotated Code of Maryland, Courts and Judicial Proceedings Art-

icle, Section 1-501 and 12-308, the Common Law of the State of Maryland; and the inherent power of the Courts of Maryland. As the Court of Appeals said in *Attorney General of Maryland, et al. v. Waldron*, 289 Md. 683, 691, 426 A.2d 929 (1981):

> In order to accomplish the purposes for which they are created, courts must also possess powers. From time immemorial, certain powers have been conceded to courts, because they are courts. Such powers have been conceded, because without them they could neither maintain their dignity, transact their business, nor accomplish the purposes of their existence. * * * "The inherent power of the court is the power to protect itself; the power to administer justice. . . .; the power to promulgate rules for its practice; and the power to provide process where none exists. It is true that the judicial power of this court was created by the Constitution, but, upon coming into being under the Constitution, this court came into being with inherent powers." [State v. Cannon, 196 Wis. 534, 221 N.W. 603, 603-04 (1928) (quoting In re Bruen, 102 Wash. 472, 172 P. 1152 (1918).]

2. It is submitted that this Court clearly has continuing jurisdiction over the cases it decides, for limited purposes, as Judge Thieme of the Court of Special Appeals observed with respect to the continuing jurisdiction of a trial Court at footnote 1 in *Pickett v. NOBA, Inc.*, 114 Md.App. 552, 691 A.2d 268 (1997):

> 1 This is a "final" judgment even though possibly subject to revision on disposition of a post-judgment motion because "[a] judgment is never final in the absolute sense, since it is always subject to modification under very restricted circumstances (such as fraud, [or mistake], for example)." P. Niemeyer & L. Schuett, Maryland Rules Commentary at 448.

BACKGROUND of the CASE

3. The instant case relates to damages for the denial of a building permit wherein a jury trial was prayed. The instant case was originally before this Court after dismissal by the trial Court. This Court reversed the trial Court and remanded the case to the Circuit for further proceedings consistent with this Court's opinion, (1st CSA), attached as Exhibit 'A'. This Court found that the issue of rezoning was an issue of disputed material fact. The trial Court, on remand, then entered an Order on April 10, 1996, on Cross-Motions for Summary Judgment, attached as Exhibit 'B', granting the Motion for Summary Judgment of the MNCPPC and denying the Motion for Summary Judgment of the Smiths. Such order was then appealed to the Court of Special Appeals that rendred an opinion (2nd CSA), attached as Exhibit 'C'. A Petition for a Writ of Certiorari of the 2nd CSA was denied by the Court of Appeals, attached as Exhibit 'D'.

4. In 1st CSA, on the issues before the Court including the issue of the propriety of the Smiths' Motion for Summary Judgment, the CSA determined that the Smiths properly pled a 42 U.S.C. 1983 claim and the case was stayed pending the outcome of the administrative appeal then pending. The administrative appeal case was determined and did not change the facts with respect to whether or not there had been a rezoning of the subject property in '88 and '90 but merely and arguably was a determination on the law as applied to the facts. The 1st CSA panel also found that the issue of "Whether a **'rezoning' has occurred is a disputed question of material fact**" (emphasis added – next to last sentence of the opinion). The Court, 1st CSA, then remanded the case to the Circuit Court for proceedings consistent with its opinion.

5. When the Circuit Court entered its opinion on the Cross-Motions for Summary Judgment, Exhibit 'B', the Circuit Court assumed that the property had, as a matter of fact, been rezoned notwithstanding the dictates of the 1st CSA that the issue of rezoning the subject property was a disputed question of material fact. As the Circuit Court said at page 2, last sentence of the first paragraph: "Lot 1-Marlborough House, on the other hand, was dual-zoned at the time this action was instituted and is the subject of the proceedings before the Court." Further, the Court, at page 5, last sentence, through page 6, said: "Contrary to the Smiths' representations regarding the effect of the MNCPPC updating base maps the Court finds that the agency did not cause Lot 1-Marlborough House to be dual-zoned." Likewise, the Circuit Court made a finding of fact that the Smith's property was dual-zoned when it said on page 7, next to last sentence of the first full paragraph, "The Smiths' property was dual-zoned and did not conform with certain of the County's plans and policies." – All notwithstanding the 1st CSA that stated that the question of rezoning was a disputed question of fact.

6. On appeal of this Court's decision, the 2nd CSA rendered its opinion, Exhibit 'C', on Cross-Motions for Summary Judgment. This 2nd CSA opinion, likewise, assumes or finds that the subject property was not re-zoned, that is, it was in dual zones as a matter of fact. As the 2nd CSA said at page 2, first sentence of second full paragraph and footnote 3, "Upon reviewing the Smiths' application, MNCPPC realized that a portion of the Property was zoned R-80 and a portion was zoned C-S-C" (in accord is footnote 3 at page 2). Likewise at page 6, first sentence of the last paragraph, "Before being updated by MNCPPC, the Property was zoned both R-80 and C-S-C."

7. The Smiths concede that if the subject property was dual zoned when they applied for a building permit then they should have applied for a special exception or a sectional map amendment. However. as the Court in 1st CSA found and said, the issue of rezoning was a disputed material fact. Once you find or assume that the factual issue that the property was not rezoned by the MNCPPC, that is, that the rezoning of the property was **not** an issue of material fact, then you are free to say, and probably should say, that the Smiths should have done what they did not do.

MISTAKE or IRREGULARITY

8. Herein are listed some of the mistakes or irregularities the Smiths contend entitle them to have this matter set aside, the Mandate recalled, and the other relief requested. Some of the items listed may, arguably, be of lesser import than others.

9. Different panels of the Court of Special Appeals, both in unreported opinions, have made opposite and conflicting decisions relating to Cross-Motions for Summary Judgment based on the same material facts:

1st CSA – the issue of rezoning the subject property is a disputed issue of material fact.

2nd CSA – the issue of rezoning the subject property is not a disputed issue of material fact.

1st CSA – acknowledged and treated the case as brought under 42 U.S.C. 1983.

2nd CSA – not acknowledged or treated the case as brought under 42 U.S.C. 1983.

1st CSA – stayed pending outcome of administrative appeal. (administrative appeal decided favorably to the Smiths)

2nd CSA – administrative appeal relating to zoning of the subject property did not entitle Smiths to damages.

After 1st CSA – **jury trial not denied.**

After 2nd CSA – **jury trial denied** by findings inconsistent with 1st CSA findings relating to the same material facts.

10. Since the time of the zoning maps in question, the '88 and '90 zoning maps, there were no additional or changed facts relating to those two particular zoning maps (that were changed some 7-9 years ago) that were material to the rezoning of the subject property. It is submitted that if rezoning is a disputed question of material fact for the 1st CSA then it is, likewise, a disputed question of material fact for the 2nd CSA. It is respectfully submitted that the facts, or disputed issue of material fact, apply equally to both parties.

11. The trial Court's son, Judge Johnson's son, was being considered for a job with one of the parties, MNCPPC, while the case was pending before Judge Johnson. Judge Johnson's son was employed by the MNCPPC shortly after the Judge's written decision in this case thereby creating the appearance of impropriety, see attachments (letters to opposing counsel), Exhibits 'E' and 'F'. This is clearly a violation of the Canons of Judicial Ethics, Canon 2, "**A judge** should behave with propriety and **should avoid even the appearance of impropriety**" (emphasis added). See also, Maryland Constitution, Article IV, Section 7, and cases cited in the Annotated Code.

12. The trial Court lacked jurisdiction and exceeded its authority when it did not follow the dictates of the 1st CSA when the Court found that the subject property

had been dual zoned when the Smiths applied for a building permit, clearly contrary to the finding in the 1st CSA. The trial Court, it is submitted, lacked jurisdiction to make such a finding since the Court in the 1st CSA had already made a contrary finding and directed the trial Court to proceed consistent with the 1st CSA opinion. It is submitted that such a jurisdictional error is clearly grounds for this Court to exercise revisory power. *Ellis v. Ellis,* 19 Md.App. 361, 311 A.2d 428 (1973), *Johnston v. Johnston,* 297 Md. 48, 465 A.2d 436 (1983). Where the trial Court does not follow the mandate, it effects subject matter jurisdiction, *McNeil v. State,* 112 Md.App. 434, 685 A.2d 839 (1996), See also, *Klopfer v. Werber,* 264 Md. 419, 286 A.2d 776 (1972). Here the mandate of the 1st CSA stated: "Case remanded to the circuit court for proceedings consistent with this opinion". Of course, Maryland Rule 8-606 provides that the lower court shall proceed in accordance with its terms. For the purpose of this argument, it is submitted that Judge Johnson lacked subject matter jurisdiction (there was an intervening administrative appeal on the issue of the changes to the zoning map that was, arguably, *res judicata*) to make the finding that he did on the disputed issue of material fact relating to the rezoning of the subject property.

DUE DILIGENCE

13. This matter has not been submitted to the Courts previously or to whatever body handles complaints against Judges (although the undersigned counsel admittedly should know what body), because Counsel for the Smiths did not want to embarrass the trial Judge by bringing up the Judge's clear appearance of impropriety and it was counsel's experience that judicial errors at the

trial level are corrected on appeal. While this case was pending before the trial Judge, the Judge's son was being considered for a job with the MNCPPC, a party to this litigation. While this case was pending before the trial Judge, the Judge's son was, in fact, employed by the MNCPPC, that is, while the case was still pending before the trial Judge after the written decision and including that period of time from the date of the written decision until the case had been appealed. For all that is known to the undersigned counsel, the Judge may have had (counsel hope's that this is not the case) a direct financial interest in the employment of his son by the MNCPPC. In any event, it is respectfully submitted that the Judge's son being hired or employed by one of the parties while the case is pending before the Judge clearly gives an appearance of impropriety.

14. Further, the undersigned counsel was an experienced appellate lawyer having handled more than twenty-one (21) reported Maryland appellate decisions, Exhibit 'G' attached and incorporated herein, plus a large number of unreported decisions (including three of which were involved in the instant land use case plus one U.S. Court of Appeals appellate case, 981 F.2d 1326 [1993]). It is submitted that an experienced appellate lawyer is entitled to rely on the Maryland Court of Special Appeals to render consistent opinions based on the same facts. It is further submitted that an experienced appellate lawyer is entitled to rely on the appellate courts to correct any errors. It has been the experience of the undersigned counsel that this is the first case he has seen, heard of, or been involved in where two different panels of the Court of Special Appeals have rendered two opposite and conflicting opinions on a single and vitally important issue, the issue of whether or not

there had been a rezoning of the subject property (the key finding in the whole case), where there has been no change of material fact. Kindly note that counsel is not here arguing the merits of the factual or law determination of the trial or appellate Courts. The conduct of the Court of Special Appeals in 1st CSA and 2nd CSA do not conform to what the undersigned lawyer has experienced before this Court. These opposite and conflicting opinions are clearly the type of mistake or irregularity, one out of the ordinary and not in conformity with Court practice, to which this Court has inherent revisory power and to which Maryland Rule 2-535 is directed thereby permitting the Circuit Court to reconsider its decision (affirmance, reversal, or recusal). It is respectfully submitted that the Court of Special Appeals and the Circuit Court have the inherent power as well as that power conferred in Art. IV, Section 1, of the Maryland Constitution to grant the relief requested. It is further respectfully submitted that this case is clearly not in conformity with the usually consistent opinions from the Court of Special Appeals. There is a long line of cases that say that 'irregularity' means "the doing or not doing of that, in the conduct of a suit at law, which, conformable with the practice of the Court, ought or ought not to be done." *Bowen v. Rohnacher, etc., et al.,* 15 Md.App. 280, 285, 290 A.2d 560 (1972). See also, *Mutual Benefit Society of Baltimore, Inc. v. Haywood,* 257 Md. 538, 263 A.2d 868 (1970). It is submitted that it is the irregularity of the two opposing opinions on the same issue from the Court of Special Appeals, that are not in conformity with the usual practice of the Court of Special Appeals – clearly that type of irregularity that requires that the 2nd CSA opinion 'ought' to be changed.

15. Kindly note that this matter is brought to the attention of the Court within two months of being notified by the Court of Appeals that Cert. was Denied, Exhibit 'D'. This case is uniquely simple notwithstanding all the papers filed herein -- did the MNCPPC change the zoning map of the subject property without notice or hearing?

16. In the final analysis, there is no harm in setting aside the order entered by this Court other than the expenditure of taxpayer (all parties other than the Smiths are governmental entities) and the Smiths' money (not an inconsiderable amount) and time. Further, justice and the appearance of justice will be better served by permitting the trial Judge to consider this matter. Further, this is an unreported opinion and, thus, pertains only to the litigants here. Further, as stated previously, this is really a very simple matter, that is, whether the MNCPPC changed the zoning map without notice or hearing, notwithstanding all of the papers filed by both parties that have the effect of distracting the Court's necessary focus upon the only really important issue of the case (of course, there are other important issues and the Smiths are not waiving or conceding them by any position stated herein.)

CONCLUSION

17. It is submitted that the Smiths have shown sufficient mistake or irregularity, good faith, and due diligence, to enable this Court to grant the relief requested and that it is in the interest of the litigants and the judicial system of Maryland to permit the trial Judge to have the opportunity to consider this matter since it may reflect adversely on the integrity of the judicial system. It is respectfully requested that this Court look favorably

on this Petition using its discretion ". . . liberally lest technicality triumph over justice." *Eschelman v. Schef-tel,* 231 Md. 300, 301, 189 A.2d 818 (1963).

18. Attached hereto is a copy of the Plaintiffs' Motion to Set Aside Order, Recusal of the trial Judge, and Motion to Stay Consideration filed concurrently with the Circuit Court for Prince George's County, Maryland. The Exhibits there are identical to the Exhibits in this Petition and are not included as part of the copy of the Circuit Court Motion to conserve paper.

WHEREFORE, Your Petitioners pray:

1. That this Court recall its Mandate issued May 14, 1997.

2. That this Court set aside or vacate its Opinion filed in this matter on April 14, 1997.

3. That this Court remand this case to the Circuit Court for Prince George's County, Maryland, for that Court's consideration of the Motion to Set Aside Order, etc., filed in those proceedings.

4. That the Circuit Court be directed to proceed consistent with the Unreported Opinion in this matter, No. 1430, September Term, 1991, filed on April 28. 1992, in these proceedings.

5. And for such other and further relief as the Court may deem just and proper.

/s/ Jess Joseph Smith, Jr.
Jess Joseph Smith, Jr.
Counsel for Appellants
P.O. Box 1995
Upper Marlboro, MD 20773-1995
(301) 627-8200

[Certificate of Service Omitted In Printing]

[For the following documents see these listed pages:

- Opinion, (1st CSA), unreported, Filed April 28, 1992 at 1a.
- Judge Johnson's Memorandum and Order of Court, April 10, 1996 at 15a.
- Opinion, (2d CSA), unreported, Filed April 14, 1997 at 24a.
- Denial of Certiorari, Aug. 22, 1997 at 62a.]

[EXHIBIT 'E']

Law Office of

Jess Joseph Smith, Jr.
14518 Church Street
P.O. Box 1995
Upper Marlboro, MD 20773-1995
301.627.8200 – FAX 301.627.0396 – jj@jjs.com

April 11, 1996

Via FAX 952-3444 and mail:

Isaac Marks. Esq.
Associate General Counsel
MNCPPC, Room 4120, CAB
14741 Governor Oden Bowie Drive
Upper Marlboro, Maryland 20772

Re: Smith, et vir. v. MNCPPC, et al.
CAE 89-24602

Dear Mr. Marks:

You called me later yesterday afternoon to indicate to me that Judge Johnson's son had applied for a job as a lawyer at the MNCPPC and that he was the best qualified for the position.

You asked if I had any objection.

It would appear to me to be inappropriate for a litigating party to employ a judge's son while there is a pending case of one of the litigating parties before the judge – just as I would consider it inappropriate for me to employ the judge's son.

It was my impression from talking to you that you would convey my concerns to the judge's son. Of course,

I would likewise consider it inappropriate for you to convey to the judge's son my position on this matter inasmuch as it could prejudice the judge's consideration of this case since it would unquestionably get back to the judge.

My experience over approximately 25 years is that when a local attorney has a personal matter before the local court that the case is set specially before an out of county judge as it was before Judge Bowling retired. This would seem a better solution and if you would consent to doing that, I will prepare a request that the matter be set down specially before an out of county judge. That way there would clearly be not compromise of anyone's position and Judge Johnson's son would have the job you seemed to be saying that you were offering him but for my opposition.

If you have any questions in this regard, please do not hesitate to contact me.

Respectfully,

/s/ Jess Joseph Smith, Jr.
Jess Joseph Smith, Jr.

JJS:db

cc: Eric S. Slatkin, Esq.

[EXHIBIT F]

THE MARYLAND-NATIONAL CAPITAL
PARK AND PLANNING COMMISSION

14741 Governor Oden Bowie Drive
Upper Marlboro, Maryland 20772
TDD: [301] 952-3796

Legal Department
(301) 952-4501
(301) 952-3444 Facsimile

April 12, 1996

VIA FACSIMILE AND FIRST CLASS MAIL

Eric Slatkin, Esquire
Suite 202
15304 Spencerville Court
P.O. Box 660
Burtonsville, Maryland 20866

Jess Joseph Smith, Jr., Esq.
14158 Church Street
P.O. Box 1995
Upper Marlboro, Maryland 20773-1995

RE: *Smith, et vir. v. M-NCPPC, et al.*,
CAE-89-24602

Dear Messrs. Slatkin and Smith.

I am in receipt of the letter, dated April 11, 1996, from J.J. Smith following my April 10 telephone call to both of you regarding the Commission's receipt of a resume' from George Johnson. As you know, George Johnson is the son of Judge Johnson. This matter now appears to be moot in light of the court's decision of April 10.

I would like to clarify, however, that at the time of my call, the Commission had not interviewed Judge Johnson's son and had not contemplated doing so prior to April 10. Further, the Commission has not spoken with Judge Johnson's son regarding this case nor does it plan to do so.

With respect to Mr. Smith's request to assign the case to an out-of-county judge, again, I think such a request is now moot. In any event, however the Commission would object to same.

Please contact me if you have any questions regarding this matter.

Sincerely,

/s/ Isaac H. Marks
Isaac H. Marks
Associate General Counsel

[EXHIBIT 'G']

2 + 633 A.2d 855, 333 Md. 3 MARYLAND-NATIONAL CAPITAL PARK & PLANNING COMM'N V. (Ct. App. 1993)

1 + 511 A.2d 527, 68 Md. App. 242 RYPMA V. STEHR (Ct. Sp. App. 1986)

1 + 405 A.2d 301, 43 Md. App. 302 BURROUGHS V. GARNER (Ct. Sp. App. 1979)

1 + 403 A.2d 1277, 43 Md. App. 99 LADY V. PRINCE GEORGE'S COUNTY (Ct. Sp. App. 1979)

1 + 365 A.2d 343, 33 Md. App. 644 PRINCE GEORGE'S COUNTY V. BAHRAMI (Ct. Sp. App. 1976)

2 + 360 A.2d 6, 32 Md. App. 256 ENTZIAN V. PRINCE GEORGE'S COUNTY (Ct. Sp. App. 1976)

1 + 358 A.2d 258, 31 Md. App. 704 BUSADA V. RANSOM MOTORS, INC. (Ct. Sp. App. 1976)

1 + 344 A.2d 171, 28 Md. App. 64 BADEN V. CASTLE (Ct. Sp. App. 1975)

1 + 314 A.2d 118, 271 Md. 82 RADIO COMMUNICATIONS, INC. V. PUBLIC SERV. COMM'N (Ct. App. 1974)

1 + 310 A.2d 205, 19 Md. App. 143 PASSMORE V. HARRISON (Ct. Sp. App. 1973)

1 + 297 A.2d 683, 267 Md. 338 PRINCE GEORGE'S CTY. V. M & B CONSTR. CORP. (Ct. App. 1972)

1 + 289 A.2d 581, 265 Md. 401 PRINCE GEORGE'S CTY. V. ARUNDEL SUPPLY CORP. (Ct. App. 1972)

1 + 289 A.2d 585, 265 Md. 371 ARUNDEL SUPPLY CORP. V. CASON (Ct. App. 1972)

1 + 287 A.2d 286, 264 Md. 562 BARRANCA V. PRINCE GEORGE'S COUNTY (Ct. App. 1972)

1 + 285 A.2d 649, 264 Md. 148 PRINCE GEORGE'S CTY. V. MEININGER (Ct. App. 1972)

1 + 284 A.2d 203, 263 Md. 655 PRINCE GEORGE'S COUNTY V. BLUE BIRD CAB CO. (Ct. App. 1971)

1 + 284 A.2d 5, 263 Md. 560 WAGNER V. BOARD OF COUNTY COMM'RS FOR PRINCE GEORG (Ct. App. 1971)

1 + 284 A.2d 261, 13 Md. App. 497 MURPHY V. BOARD OF COUNTY COMM'RS (Ct. Sp. App. 1971)

1 + 282 A.2d 491, 263 Md. 217 PRINCE GEORGE'S COUNTY COUNCIL V. PRETWICK, INC. (Ct. App. 1971)

1 + 280 A.2d 901, 263 Md. 1 MONTGOMERY V. BOARD OF COUNTY COMM'RS FOR PRINCE G (Ct. App. 1971)

1 + 276 A.2d 661, 261 Md. 699 CASON V. BOARD OF COUNTY COMM'RS FOR PRINCE GEORGE (Ct. App. 1971)

IN THE CIRCUIT COURT
FOR PRINCE GEORGE'S COUNTY, MARYLAND

CAE 89-24602

MAENETTE B. SMITH, et vir

Plaintiffs

vs.

MARYLAND NATIONAL CAPITAL
PARK & PLANNING COMMISSION, et al.

Defendants

PLAINTIFFS' MOTION to SET ASIDE ORDER,
RECUSAL of the TRIAL JUDGE,
STATEMENT of GROUNDS and AUTHORITIES
and
MOTION to STAY CONSIDERATION

Comes now the Plaintiffs, Maenette B. Smith, et vir, as tenants-by-entirety (referred to as the 'Smiths' for clarity because there are multiple cases referred to herein), by and through their attorney, Jess Joseph Smith, Jr., and, pursuant to Maryland Rules 2-535, and 2-311, and file this Motion to Set Aside Order Statement of Points and Authorities, and Motion to Stay Consideration, and say:

JURISDICTION

1. This court has jurisdiction of the instant matter and for the relief prayed, such jurisdiction being found in the Maryland Constitution, Article IV, Section 1; the Maryland Declaration of Rights, Article 5; the Annotated Code of Maryland, Courts and Judicial Proceedings Article, Sections 1-501; the Common Law of the State of

Maryland; and the inherent power of the Courts of Maryland; and including Maryland Rule 2-535. As the Court of Appeals said in *Attorney General of Maryland, et al. v. Waldron,* 289 Md. 683, 691, 426 A.2d 929 (1981):

> In order to accomplish the purposes for which they are created, courts must also possess powers. From time immemorial, certain powers have been conceded to courts, because they are courts. Such powers have been conceded, because without them they could neither maintain their dignity, transact their business, nor accomplish the purposes of their existence. * * * "The inherent power of the court is the power to protect itself; the power to administer justice . . . .; the power to promulgate rules for its practice; and the power to provide process where none exists. It is true that the judicial power of this court was created by the Constitution, but upon coming into being under the Constitution, this court came into being with inherent powers." [State v. Cannon, 196 Wis. 534, 221 N.W. 603, 603-04 (1928) (quoting In re Bruen, 102 Wash. 472, 172 P. 1152 (1918).]

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found and said, the issue of rezoning was a disputed material fact. Once you find or assume that the factual issue that the property was not rezoned by the MNCPPC, that is, that the rezoning of the property was not an issue of material fact, then you are free to say, and probably should say, that the Smiths should have done what they did not do.

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10. Since the time of the zoning maps in question, the '88 and '90 zoning maps, there were no additional or changed facts relating to those two particular zoning maps (that were changed some 7-9 years ago) that were material to the rezoning of the subject property. It is submitted that if rezoning is a disputed question of material fact for the 1st CSA then it is, likewise, a disputed question of material fact for the 2nd CSA. It is respectfully submitted that the facts, or disputed issue of material fact, apply equally to both parties.

11. The trial Court's son, Judge Johnson's son, was being considered for a job with one of the parties, MNCPPC, while the case was pending before Judge Johnson. Judge Johnson's son was employed by the MNCPPC shortly after the Judge's written decision in this case thereby creating the appearance of impropriety, see attachments (letters to opposing counsel), Exhibits 'E' and 'F'. This is clearly a violation of the Canons of Judicial Ethics, Canon 2, "**A judge** should behave with propriety and **should avoid even the appearance of impropriety**" (emphasis added).

12. The trial Court lacked jurisdiction and exceeded its authority when it did not follow the dictates of the 1st CSA when the Court found that the subject property had been dual zoned when the Smiths applied for a building permit, clearly contrary to the finding in the 1st CSA. The trial Court, it is submitted, lacked jurisdiction to make such a finding since the Court in the 1st CSA had already made a contrary finding and directed the trial

Court to proceed consistent with the 1st CSA opinion. It is submitted that such a jurisdictional error is clearly grounds for this Court to exercise revisory power. *Ellis v. Ellis,* 19 Md.App. 361, 311 A.2d 428 (1973), *Johnston v. Johnston,* 297 Md. 48, 465 A.2d 436 (1983). Where the trial Court does not follow the mandate, it effects subject matter jurisdiction, *McNeil v. State,* 112 Md.App. 434, 685 A.2d 839 (1996). See also, *Klopfer v. Werber,* 264 Md. 419, 286 A.2d 776 (1972). Here the mandate of the 1st CSA stated: "Case remanded to the circuit court for proceedings consistent with this opinion". Of course, Maryland Rule 8-606 provides that the lower court shall proceed in accordance with its terms. For the purpose of this argument, it is submitted that Judge Johnson lacked subject matter jurisdiction (there was an intervening administrative appeal on the issue of the changes to the zoning map that was, arguably, *res judicata*) to make the finding that he did on the disputed issue of material fact relating to the rezoning of the subject property.

DUE DILIGENCE

13. This matter has not been submitted to the Courts previously or to whatever body handles complaints against Judges (although the undersigned counsel admittedly should know what body), because Counsel for the Smiths did not want to embarrass the trial Judge by bringing up the Judge's clear appearance of impropriety and it was counsel's experience that judicial errors at the trial level are corrected on appeal. While this case was pending before the trial Judge, the Judge's son was being considered for a job with the MNCPPC, a party to this litigation. While this case was pending before the trial Judge, the Judge's son was, in fact, employed by the MNCPPC, that is, while the case was still pending before

the trial Judge after the written decision and including that period of time from the date of the written decision until the case had been appealed. For all that is known to the undersigned counsel, the Judge may have had (counsel hope's that this is not the case) a direct financial interest in the employment of his son by the MNCPPC. In any event, it is respectfully submitted that the Judge's son being hired or employed by one of the parties while the case is pending before the Judge clearly gives an appearance of impropriety.

14. Further, the undersigned counsel was an experienced appellate lawyer having handled more than twenty-one (21) reported Maryland appellate decisions, Exhibit 'G' attached and incorporated herein, plus a large number of unreported decisions (including three of which were involved in the instant land use case plus one U.S. Court of Appeals appellate case, 981 F.2d 1326 [1993]). It is submitted that an experienced appellate lawyer is entitled to rely on the Maryland Court of Special Appeals to render consistent opinions based on the same facts. It is further submitted that an experienced appellate lawyer is entitled to rely on the appellate courts to correct any errors. It has been the experience of the undersigned counsel that this is the first case he has seen, heard of, or been involved in where two different panels of the Court of Special Appeals have rendered two opposite and conflicting opinions on a single and vitally important issue (the issue of whether or not there had been a rezoning of the subject property (the key finding in the whole case), where there has been no change of material fact. Kindly note that counsel is not here arguing the merits of the factual or law determination of the trial or appellate courts. The conduct of the Court of Special Appeals in 1st CSA and 2nd CSA do not conform to what the under-

signed lawyer has experienced before this Court. These opposite and conflicting opinions are clearly the type of mistake or irregularity, one out of the ordinary that is not in conformity with court practice, to which this Court has inherent revisory power and to which Maryland Rule 2-535 is directed thereby permitting the Circuit Court to reconsider its decision (affirmance, reversal, or recusal). It is respectfully submitted that the Court of Special Appeals and the Circuit Court have the inherent power as well as that power conferred in Art. IV, Section 1, of the Maryland Constitution to grant the relief requested. It is further respectfully submitted that this case is clearly not in conformity with the usually consistent opinions from the Court of Special Appeals. There is a long line of cases that say that 'irregularity' means "the doing or not doing of that, in the conduct of a suit at law, which, conformable with the practice of the court, ought or ought not to be done." *Bowen v. Rohnacher, etc., et al.,* 15 Md.App. 280, 285, 290 A.2d 560 (1972). See also, *Mutual Benefit Society of Baltimore, Inc. v. Haywood,* 257 Md. 538, 263 A.2d 868 (1970). It is submitted that it is the irregularity of the two opposing opinions on the same issue from the Court of Special Appeals, that are not in conformity with the usual practice of the Court of Special Appeals – clearly that type of irregularity that requires that the 2nd CSA opinion 'ought' to be changed.

15. Kindly note that this matter is brought to the attention of the Court within two months of being notified by the Court of Appeals that Cert. was Denied, Exhibit 'D'. This case is uniquely simple notwithstanding all the papers filed herein – did the MNCPPC change the zoning map of the subject property without notice or hearing?

16. In the final analysis, there is no harm in setting aside the order entered by this Court other than the expenditure of taxpayer (all parties other than the Smiths are governmental entities) and the Smiths' money (not an inconsiderable amount) and time. Further, justice and the appearance of justice will be better served by permitting the trial Judge to consider this matter. Further, this is an unreported opinion and, thus, pertains only to the litigants here. Further, as stated previously, this is really a very simple matter, that is, whether the MNCPPC changed the zoning map without notice or hearing, notwithstanding all of the papers filed by both parties that have the effect of distracting the Court's necessary focus upon the only really important issue of the case (of course, there are other important issues and the Smiths are not waiving or conceding them by any position stated herein.)

CONCLUSION

17. It is submitted that the Smiths have shown sufficient mistake or irregularity, good faith, and due diligence, to enable this Court to grant the relief requested and that it is in the interest of the litigants and the judicial system of Maryland to permit the trial Judge to have the opportunity to consider this matter since it may reflect adversely on the integrity of the judicial system. It is respectfully requested that this Court look favorably on this Petition using its discretion ". . . liberally lest technicality triumph over justice." *Eschelman v. Scheftel,* 231 Md. 300, 301, 189 A.2d 818 (1963).

18. Attached hereto is a copy of the Petition for Extraordinary Relief filed concurrently with the Court of Special Appeals. The Exhibits there are identical to the Exhibits in this Motion and are not included as part of

the copy of the Court of Special Appeals Petition to conserve paper.

19. It is respectfully requested that this Plaintiffs' Motion to Set Aside Order, Recusal of the Trial Judge, and Motion to Stay Consideration be stayed pending the Court of Special Appeals consideration of the Petition for Extraordinary Relief filed in that Court.

WHEREFORE, Your Petitioners pray:

1. That this Court Reconsider its Order dated April 10, 1996.

2. That this Court set aside or strike its Order dated April 10, 1996.

3. That this Court recuse himself from further proceedings in this case.

4. That this case be set down before an out of County Judge in the same Judicial Circuit.

5. That the decision of this Court be stayed pending the Court of Special Appeals review of the Petition for Extraordinary Relief filed herewith.

6. And for such other and further relief as the Court may deem just and proper.

/s/ Jess Joseph Smith, Jr.
Jess Joseph Smith
Counsel for Plaintiffs
P.O. Box 1995
14518 Church Street
Upper Marlboro, MD 20773-1995
(301) 627-8200

[Certificate Of Service Omitted In Printing]

APPENDIX H

[SEAL]

COURT OF SPECIAL APPEALS

COURT OF APPEAL BUILDING
ANNAPOLIS, MD. 21401-1899
(410) 974-3646
WASHINGTON AREA (301) 261-2920

LESLIE D. GRADET
CLERK

KATHARINE M. KNIGHT
CHIEF DEPUTY

November 12, 1997

Jess Joseph Smith, Jr., Esquire
P.O. Box 1995
Upper Marlboro, Maryland 20773-1995

Re: Maenette B. Smith et vir vs. Maryland-National Capital Park and Planning Commission et al.
No. 927, September Term, 1996

Dear Mr. Smith:

On November 10, 1997, Appellants' Petition for Extraordinary Relief was denied by Chief Judge Murphy.

Very truly yours,

/s/ Leslie D. Gradet
Leslie D. Gradet
Clerk

LDG:ls
cc: J. Michael Dougherty, Jr., Esq.
Isaac H. Marks, Esquire

APPENDIX I

EXCERPTS FROM BRIEF OF APPELLANTS,
Court of Special Appeals,
No. 927, Sept. Term, 1996

[Filed Sept. 23, 1996]

* * *

QUESTIONS PRESENTED

I. WHETHER OR NOT THE TRIAL COURT ERRED IN FINDING THAT THE PRIOR FINAL ADJUDICATION OF THE SUBDIVISION OF THE SUBJECT PROPERTY AND THE FINAL DECISION OF THE ADMINISTRATIVE APPEAL CASE RELATING TO THE BUILDING PERMIT DENIAL OF THE INSTANT CASE WERE NOT RES JUDICATA AS TO THE MATERIAL ISSUES ON LIABILITY IN THE INSTANT CASE?

II. WHETHER OR NOT THE TRIAL COURT ERRED IN GRANTING THE CROSS-MOTION FOR SUMMARY JUDGMENT FILED BY THE MNCPPC?

III. WHETHER OR NOT THE TRIAL COURT ERRED IN DENYING THE APPELLANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT?

IV. WHETHER OR NOT THE TRIAL COURT ERRED IN FINDING THAT A PROPERTY OWNER MUST BE DEPRIVED OF ALL BENEFICIAL USE OF HIS PROPERTY FOR A LOCAL GOVERNMENT TO BE LIABLE UNDER 42 U.S.C. 1983?

V. WHETHER OR NOT THE DENIAL OR DElaY OF A BUILDING PERMIT FOR A PERIOD OF TIME OR APPROXIMATELY FIVE (5) YEARS

WAS A GOVERNMENTAL TAKING OF PROPERTY, A DENIAL OF PROCEDURAL DUE PROCESS, OR A DEPRIVATION OF ANY RIGHTS, PRIVILEGES, OR IMMUNITIES SECURED BY THE CONSTITUTION AND LAWS AND DOES NOT CREATE LIABILITY UNDER 42 U.S.C. 1983?

VI. WHETHER OR NOT A LOCAL GOVERNMENT'S CHANGING THE ZONING MAP OF A LANDOWNER'S PROPERTY WITHOUT NOTICE OR HEARING, WHEN SUCH NOTICE AND HEARING IS REQUIRED BY LAW TO CHANGE ANY ZONING MAP, AND THE LOCAL GOVERNMENT'S SUBSEQUENT RELIANCE ON THE CHANGED ZONING MAP TO DENY A BUILDING PERMIT TO THE PROPERTY OWNER DOES NOT CREATE LIABILITY UNDER 42 U.S.C. 1983?

VII. WHETHER OR NOT THE TRIAL COURT ERRED IN DISMISSING, WITHOUT REASON, PRINCE GEORGE'S COUNTY AS A PARTY?

STATEMENT OF FACTS[1]

RELATED CASES

1. In addition to the instant case, there have been other cases relating to the development of the subject property, known as the 'Marlborough House'. The first case between the parties related to the

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[1]Throughout this brief, references are make to the exhibits and transcript of proceedings before the Board of Appeals for Prince George's County, Maryland, that were under oath, a public record (C&J §10-204), and filed in this case with the Affidavit of Lois G. Burch (E.377) as part of paper #58. In most cases, only the pertinent portions of these exhibits and transcript of those proceedings have been reproduced. In some cases, plats have been reduced in size.

denial of the subdivision of the property by the Maryland National Capital Park & Planning Commission (MNCPPC), referred to as the 'subdivision case' and the "86 case.[2] That case was resolved favorably to the Plaintiffs (Appellants here) in *Maenette B. Smith, et vir v. Maryland National Capital Park & Planning Commission*, CAL 86-12679, in the Circuit Court for Prince George's County, Maryland. The Order and approved subdivision plats are at E.97-99, 279-281. The final subdivision plats were approved by the MNCPPC on 4/16/87 for 'Content' and on 2/18/88 for 'Marlborough House' which was recorded among the Land Records of Prince George's County, Maryland, at Liber NLP 137, Plat 54[3]. The Court Order in the subdivision case expressly approved the Subdivision Plat No. 4-86100, 'Lot One, Marlborough House' with the notation "Existing zone: CSC" (E.97, 98) that is, all of the subject property was in the CSC zone (E.97, 98). The subdivision case was not appealed further by either party.

2. The second case, the instant case for damages and injunction, with jury demand, was filed in 1989 after the Appellants had been notified that their building permit application would be denied based on a zoning map that had been changed by the MNCPPC without notice or hearing. Since the

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[2]The denial was based, inter alia, on the subject property being adjacent to a home that was on the National Historic Registry.

[3]The northern boundary of the subject property had been settled in 1968 by a Deed of Agreement to Establish Boundary Line (E.379-381) and also recorded among the Land Records of Prince George's County, Maryland.

Appellants now have their building permit, they are no longer seeking injunctive relief but are merely seeking damages.

3. The **third case**, an unreported decision of the Court of Special Appeals, *Maenette B. Smith, et vir v. Prince George's County, Maryland,* No. 1654, September Term 1991, cert. denied, was a mandamus action brought by the Appellants. That case was dismissed by the Court because an administrative appeal was pending, the fourth case.
4. The **fourth case**, an administrative appeal referred to as the 'administrative appeal case' and the "91 case', *Prince George's County, et al. v. Maenette B. Smith, et vir,* CAL 91-00205, was an appeal of the Board of Appeals decision finding that the MNCPPC had changed the zoning map of the subject property. The case was appealed by all parties here, namely the MNCPPC, Prince George's County, and the Appellants (the Appellants here appealed to preserve, inter alia, the issues of res judicata relating to the subdivision case and reliance on a governmental official and direct or collateral estoppel in the administrative appeal case). The fourth case went to the Court of Appeals and that Court, in a reported opinion, *Maryland National Capital Park & Planning Commission, et al. vs. Maenette B. Smith, et vir,* 333 Md. 3, 633 A.2d 855 (1993), dismissed the MNCPPC as an appellant inasmuch as the MNCPPC was not an aggrieved party although the MNCPPC appeared and vigorously defended its position before the Board of Appeals and all courts. This fourth case went back to the Circuit Court for trial[4]

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[4]Where counsel for the MNCPPC, although MNCPPC had been dismissed as a party, nevertheless remained as co-counsel for

[footnote continued]

and was dismissed by Order dated March 14, 1995, (E.378) since the building permit had been issued on October 26, 1994.

5. There was a **fifth case** that was filed in the U.S. District Court for Maryland, *Smith, et vir v. MNCPPC, et al.*, MJG 93-742, under 42 U.S.C. 1983 and that case was dismissed by counsel for the Appellants.

BACKGROUND

6. That the Appellants purchased the subject property on Church Street in Upper Marlboro comprising slightly more than one (1) acre in April of 1977, and are the owners, as tenants-by-the-entirety. At the time the property was purchased by the Appellants, it was zoned approximately one-half in the R-80 zone and approximately one-half in the CSC zone.
7. That the Appellants filed a subdivision application to develop their property inasmuch as part of it was zoned as commercial (CSC) and part was zoned residential (R-80).
8. That the property was to be divided into essentially equal parts with the line dividing the CSC zone and the R-80 zone being selected as the boundary line. The zoning map of the subject property (E. 404) was unclear and it was taken to Mr. Art Tankersley, the individual in the Maryland National Capital Park and Planning Commission (MNCPPC) who was in charge of the Sectional Map Amendment process for the area that included the Town of Upper Marlboro, so that the zoning line and the property line between the newly created subdivisions would be

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Prince George's County, Maryland, [E400-401), over objection, and later entered his appearance as co-counsel individually (E.401a, 401b) using the MNCPPC address.

co-located along the existing zoning line thereby forming two (2) adjacent lots (E.50-63,176-178) and that the scale of 1" = 200' was written on the map by Mr. Tankersley who measured off the ditance for the location of the property boundary line as 140' dividing the two lots and that notation was placed on the zoning map by J. J. Smith (E.50-63, 404).

9. That the Appellants relied on this representation and subdivided their property so that Content would be 140' on both the north and south boundaries (E.50-63) with the CSC zoned property being designated as 'Lot One, Marlborough House' and the R-80 zoned property being designated as 'Lot One, Content' (E.98,99).
10. The Appellants planned to develop the property, Lot One, Marlborough House, as shown on the landscape plan of the subject property (E.64).
11. That the Appellants have expended over $100,000.00 cash of their money for architect, engineering, surveying, soil borings, financing, bonds, and other miscellaneous expenses in reliance on the representations of the governmental official of the MNCPPC, Mr. Tankersley, that the zoning line and the property boundary line was at the location used by them when their subdivision application was filed with the MNCPPC (E.50-63,404).

SUBDIVISION PROCESS

12. The MNCPPC requires the listing of the zoning category of the property being subdivided on the preliminary subdivision plat and on the application for subdivision of land in Prince George's County, Maryland (E.74,98).

13. That, at the hearing before the Board of Appeals where the Appellants contested the denial of the building permit, a representative of the MNCPPC testified that the zoning of a property is important in their review of the preliminary subdivision plat by the MNCPPC and that a subdivision applicant files an application, pays a fee based on the size and zoning of the subject property, and the MNCPPC, through its staff, reviews the preliminary subdivision application for, among other things, the proper zoning of the property for the proposed use, Alan S. Hirsch, head of the subdivision office of MNCPPC (E.65-69).
14. The Subdivision Review Committee, a multi-governmental committee, also reviews the preliminary plan for application of the laws relating to subdivision of property.
15. After the Subdivision Review Committee and the MNCPPC staff review the preliminary plan of subdivision, the matter is scheduled for hearing before the MNCPPC.
16. At the time the Appellants filed the subdivision application, the only zoning map that was adopted and approved by the District Council for the subject property was the map dated as 'base map latest update 7-12-77, zone map latest update 11-30-78, map (E.100,104-120,404) and that such map was at that time the only zoning map relating to the subject property that was adopted and approved by the District Council (E.104-106,268-269).
17. That, on 7/19/86, the MNCPPC denied the subdivision application for both parcels by resolution and stated that 'Marlborough House (Lot 1)' was zoned CSC, and that 'Content (Lot 1)' was zoned R-80 (E.79-73).

18. That at the time of the subdivision all of the files of the MNCPPC relating to the subdivision of the subject property show that the subject property was zoned CSC (E.74-81).
19. That the Memorandum of Law filed by the counsel for the MNCPPC in the subdivision case in the Circuit Court, *supra,* stated that "Petitioners herein are the Owners of a .5522 parcel of land known as Marlborough House [the subject property] and zoned in the C-S-C category . . .", (E.81-96).
20. That the zoning of a property is an issue in the subdivision process (E.180).

ZONING MAPS

21. That there are four (4) zoning maps that are material to these proceedings and have been referred to as:

    The '77 **zoning map,** E.100, Approved by the District Council.

    The '88 **zoning map,** E.101, Not approved by the trict Council.

    The '90 **zoning map,** E.102, Not approved by the District Council.

    The '94 **zoning map,** E.103, This is the current version of the '77 zoning map that was approved by the District Council by adoption of the Sectional Map Amendment (SMA) for the Upper Marlboro area on 5/24/94.

22. In Prince George's County, a zoning map is comprised of two parts, a base map, for example, (E.121) and a zoning overlay map, for example, (E.122) that is placed over the base map and copied together thereby forming the zoning map. That a base map is that map encompassing the geographical area of the

county showing property boundary lines, streets, roads, streams, etc., (E.402,403) and that a zoning overlay map is that map that encompasses a geographical area of the county showing land use zones (E.123-137).

23. That, at the time of the building permit application, the only zoning map that was adopted and approved by the District Council was the '77 zoning map (E.147-165).
24. The District Council does not adopt or approve zoning overlay maps or base maps individually (E.191-192).
25. That property is not zoned or rezoned by the subdivision process (E.193-194).
26. That MNCPPC does, however, prepare zoning maps for approval of the District Council and a zoning map that is adopted and approved by the District Council may be amended only by the District Council, and then only after public notice and a hearing (E.104-106,166,252).
27. That subsequent to the noted decision in the subdivision case, the MNCPPC, **without notice or public hearing,** changed the zoning maps of the subject property on two occasions, once on 8-22-88 and once on 3-16-90, the later date was during the pendency of this case (E.123-137,174-175). The base maps for the '88 and '90 zoning maps were changed by MNCPPC (E.180-184).
28. The MNCPPC changed base maps in reliance on their budget approved by the County Council for Prince George's County (E.215-217,255-264).

BUILDING PERMIT APPLICATION PROCESS

29. That the Department of Environmental Resources (DER) of Prince George's County, Maryland, is the

County Department that handles the review of building permits in Prince George's County and the affidavit of Mr. James H. Carr (E.138-139) shows that your Appellants had, at that time, complied with all of the requirements for the issuance of a building permit except for the MNCPPC approval.

30. That building permit applications are referred to the MNCPPC for review (E.203) and the building permit will not be granted over the recommendations of the MNCPPC (E.406-416).

31. Nothing in the County Code prevents the DER from granting a building permit notwithstanding the recommendation of the MNCPPC; however, the County refused to grant the building permit until October 26, 1994 (E.406-416).

32. That the Appellants applied for a building permit and were denied a building permit by Prince George's County upon the recommendation of the MNCPPC inasmuch as part of 'Lot One, Marlborough House' was not all in the CSC zone; denial of the Appellant's building permit application was based on the '88 and '90 zoning maps (E.180-190). A building permit application for Lot One, Marlborough House was filed and was recommended for denial by the MNCPPC (E.229).

33. That the recommended denial of the building permit application by the MNCPPC was based on part of Lot One, Marlborough House, being in the residential zone and was based on the zoning map that the MNCPPC changed thereby putting part of the Appellants property into the residential zone, 'R-80', thus not complying with the setback and buffer requirements (E.140-141).

BOARD OF APPEALS DECISION

34. The Board of Appeals for Prince George's County, Maryland, an administrative body, is that statutory body that is charged by law with the expertise to hear and decide appeals from the denial of a building permit (Sec. 27-229, Prince George's County Code).
35. That the Board of Appeals of Prince George's County, Maryland, on December 20, 1990, determined that the MNCPPC had made an error in moving the lot lines on the base map of the subject property and that all of the subject property was in the CSC zone and that the zoning line remained at 400' from the center line of Water Street (E.142-146 [findings #1-14]).
36. That, at the hearing before the Board of Appeals wherein the Appellants contested the denial of the building permit application, the representative of Prince George's County testified that the building permit application was not granted by the County because of the recommendation by the MNCPPC (E.406-416).
37. MNCPPC does not adopt and approve zoning maps (E.166-173).
38. That the zoning of a parcel is required to be listed on the subdivision application and is required to be placed on the preliminary subdivision plat (E.179).
39. Ruth Senes was the person designated to testify by the Chairman, MNCPPC, and testified on behalf of the MNCPPC at the Board of Appeals hearing (E.195-196).
40. That the MNCPPC appeared in opposition to the Appellants' requested variance for the subject property (E.197-198).

41. Mr. Tankersley was present at the Board of Appeals hearing and did not present any testimony contradictory of J. J. Smith (E.51).

SUBSEQUENT ACTION

42. That the Appellants sent a letter to the County and MNCPPC relating to the then pending Sectional Map Amendment affecting their property on June 16, 1993 (E.230).
43. That the District Council approved the Sectional Map Amendment affecting the Appellants' property on 5/24/94 (E.103,282).
44. The building permit relating to the subject property was granted on October 26, 1994.
45. Roscoe Tippett, Appellants' surveyor, testified at his deposition that he conducted a boundary survey of the subject property with the intent of creating two lots (E.389-392,396) and that he was not aware of the zoning line traversing the subject property being measured 400' from the centerline of Water Street since it was not shown on the zoning map (E.398).

* * *

APPENDIX J

COURT OF APPEALS OF MARYLAND
Robert C. Murphy Courts of Appeal Building
361 Rowe Boulevard
Annapolis, Md. 21401-1699

[SEAL]

October 6, 1997

Jess Joseph Smith, Jr., Esquire
14518 Church Street
P.O. Box 1995
Upper Marlboro, MD 20773-1995

Dear Mr. Smith:

In reply to your letter of October 6, 1997 please be advised that I am not aware of any rules, policies, procedures or guidelines which the Court of Special Appeals follows in determining whether to report or not report its opinions.

Very truly yours,

/s/ Alexander L. Cummings
Alexander L. Cummings
Clerk

ALC:bmd

APPENDIX K

BRIEF SUMMARY of EACH CASE RELATING to the DEVELOPMENT of the SUBJECT PROPERTY

I. '86 case – **SUBDIVISION CASE** – This case related to the denial of the subdivision of the subject property by the MNCPPC, and is referred to as the 'subdivision case' and the '86 case'. The Head of the Subdivision Office of the MNCPPC, testified in the administrative appeal case, item IV, *infra,* that the zoning of a property is an issue in the subdivision process; that when reviewing a preliminary subdivision plat if the subdivision application[1] had any incorrect information on it, corrective action would be required. It is a requirement of the MNCPPC that the property boundaries and the zoning category of the subject property be included on the preliminary subdivision plat (submitted with the written application for subdivision approval) because, among other reasons, it determines the amount of the fee for processing the plat as well as the internal processing and review of the preliminary subdivision plat by the MNCPPC. The preliminary subdivision plat is assigned a specific number designation by the MNCPPC, here no. 4-86100. The subdivision application filed by the petitioners listed all of the subject property as in the CSC zone and the preliminary subdivision plat that was submitted, in item #3 under "NOTES", indicated: "EXISTING ZONE: CSC"[2].

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[1] The written subdivision application that is required to be submitted along with the Preliminary Subdivision Plat listed all of the subject property as being in the CSC zone.

[2] *Infra* at 126a-127a.

The MNCPPC denied the subdivision application with the minutes of the meeting denying the subdivision application stating, with respect to the subject property, ". . . and being zoned C-S-C".

The denial was appealed to the Circuit Court for Prince George's County, Maryland, and resolved favorably to the petitioners in *Maenette B. Smith, et vir v. Maryland-National Capital Park & Planning Commission*, CAL 86-12679, by order dated January 14, 1987. In its brief in the Circuit Court, counsel for the MNCPPC stated in his Memorandum of Law that "That petitioners herein are the owners of a .5522 acre parcel of land known as Marlboro House and zoned in the C-S-C category . . .", such being the entirety of the subject property.

The final subdivision plat was approved by the Chairman of the MNCPPC, pursuant to court order, on February 18, 1988, for 'Lot One, Marlborough House', the subject property, and was recorded among the Land Records of Prince George's County, Maryland, at Liber NLP 137, Plat 54[3] over the signature of the Chairman of the MNCPPC. The Court Order in this case expressly approved the Preliminary Subdivision Plat No. 4-86100, 'Lot One, Marlborough House' showing the subject property as being all zoned CSC. In his oral opinion, the court stated, ". . . he is going to create, in this courts opinion, a desirable commercial establishment, which is zoned commercial now already by this very county . . .", *infra* at 119a, 120a.

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[3]The northern boundary of the subject property had been settled in 1968 by a Deed of Agreement to Establish Boundary Line and also recorded among the Land Records of Prince George's County, Maryland, such Deed of Agreement being petitioners Exhibit #41 at the Board of Appeals and filed in the instant proceedings, see footnote 6, *infra*.

That prior to the Circuit Court Order approving the preliminary subdivision plat application showing the boundaries of the property and the CSC zoning of the subject property of the petitioners, there was not a single plat, plan, document, or piece of paper in the files of the MNCPPC or elsewhere that showed or indicated that the subject property, Lot One, Marlborough House, was in any zone other than all in the CSC zone.

The subdivision case was not appealed further by either party.

II. '89 case – DAMAGES CASE – CAE 89-24602. ***The instant case***[4] started as a Declaratory Judgment case. This case was filed on December 27, 1989, after the petitioners had been informed that their building permit application would be denied based on a zoning map that had been changed by the MNCPPC without notice or hearing. The case was later amended for injunctive relief and later to its present posture for damages only with jury demand. This case was originally dismissed by the trial judge for, *inter alia,* failure to exhaust administrative remedies and was later reversed and stayed by the Maryland Court of Special Appeals in No. 1430, Sept. Term 1992, in an ***unreported opinion*** filed April 28, 1992 ("1st CSA"). This case was then remanded to the trial court pending the disposition of the administrative appeal case, the then pending '91 case, and for a factual determination of whether or not the MNCPPC had changed the zoning map of the petitioner's property, a question of disputed material fact, since at that time the administrative appeal case was not final. Since the petitioners obtained their building permit (which has subsequently

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[4] For a more complete statement of this case, see the Statement of the Case, *supra.*

expired) they are no longer seeking injunctive relief but are seeking damages under 42 U.S.C. 1983 with jury trial. On remand, the 2nd trial court, Judge Johnson, dismissed Prince George's County as a party, granted Summary Judgment for the MNCPPC, and denied petitioners Motion for Partial Summary Judgment on liability. In an ***unreported opinion*** filed April 14, 1997, No. 927, Sept. Term 1996, the Maryland Court of Special Appeals ("2nd CSA"), affirmed the 2nd trial court. The Maryland Court of Appeals denied certiorari in Petition Docket No. 178, Sept. Term 1997 on August 22, 1997. The petitioners filed a Petition for Extraordinary Relief with the Maryland Court of Special Appeals that was denied on November 10, 1997. In the first appeal of the damages case, i.e., the 1st CSA case, both MNCPPC and Prince George's County took the same legal position in the case and submitted the same Appellee's Brief[5]

III. '90 case – **MANDAMUS CASE** – *Maenette B. Smith, et vir v. Prince George's County, Maryland,* in the Circuit Court for Prince George's County, Maryland, CAL 90-30619. This case was filed to compel the issuance of the building permit after the Board of Appeals decided the administrative appeal in the favor of the petitioners and after Prince George's County stated that they would not issue the building permit without court order. This case was dismissed by the trial Court for failure to exhaust administrative remedies since the administrative appeal case was then pending. This case was affirmed by the Court of Special Appeal in No. 1654, Sept. Term 1991, in an ***unreported opinion***, filed July 22, 1992. The Maryland Court of Appeals denied cer-

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[5]The title page and the last two pages of the Appellee's Brief are at *infra*, 137a-139a.

tiorari in Petition Docket No. 431, Sept. Term 1992 on December 9, 1992.

IV. '91 case – **ADMINISTRATIVE APPEAL CASE** – This was an administrative appeal case and is referred to as the 'administrative appeal case' and the '91 case', *Prince George's County, et al. v. Maenette B. Smith, et vir,* CAL 91-00205. The denial of the building permit by Prince George's County was appealed by the petitioners to the Board of Appeals for Prince George's County, Md. ("Board of Appeals"). The Board of Appeals found that the MNCPPC had changed the boundaries of the subject property thereby creating more than one zone for the subject property[6]. The MNCPPC and Prince George's County, as well as the petitioners[7], appealed the decision to the Court of Special Appeals, the trial court having dismissed the MNCPPC as a party. The Maryland Court of Appeals[8], sua sponte, granted certiorari and affirmed the trial court's dismissal of the MNCPPC as a party to the

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[6]At the Board of Appeals, evidence was presented that the northern boundary of the subject property had been the subject of a boundary dispute that had been settled and that a Deed of Agreement was recorded thereby fixing the northern boundary of the subject property. The Deed of Agreement was obtained from the records of the MNCPPC. The copy of the deed obtained from the MNCPPC records indicates that the deed was recorded in 1968, from the files of the MNCPPC and, thus, there was no need to employ a surveyor to determine the boundary line of the subject property.

[7]The petitioners appealed, *inter alia,* to preserve the issues that had been raised but not decided by the Board of Appeals, namely the issues with respect to detrimental reliance on the proper governmental official, estoppel and *res judicata* of the subdivision case.

[8]Where the MNCPPC, Prince George's County, and the Prince George's County Council, Sitting as the District Council (later dismissed as a party) each took the same legal position in the case and filed the same brief signed by all counsel, *infra* at 136a.

proceedings, although the MNCPPC was not an 'aggrieved party' with right to appeal, and decided no other issues in a ***reported opinion***, *Maryland National Capital Park & Planning Commission, et al. v. Maenette B. Smith, et vir,* 333 Md. 3, 633 A.2d 855 (1993), filed December 8, 1993. The MNCPPC appeared and vigorously defended its position before the Board of Appeals and all courts. This case then went back to the Circuit Court for trial[9] but was dismissed before trial by Order dated March 14, 1995, after the building permit was issued and the newly enacted Sectional Map Amendment[10] showed the entirety of the subject property as zoned CSC. The building permit was issued on October 26, 1994, and it has now expired.[11]. This administrative appeal case was final when dismissed thereby affirming or leaving the order of the Board of Appeals as the only effective order in the administrative appeal case. Although the MNCPPC was not an aggrieved party with right to appeal the Board of Appeals decision and order, this appeal took

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[9]Where counsel for the MNCPPC, although MNCPPC had been dismissed as a party, nevertheless remained as co-counsel for Prince George's County, Maryland, over objection, and later entered his appearance as co-counsel for Prince George's County individually using the MNCPPC address.

[10]The only disputed factual evidence in this case is whether or not the petitioners applied for a Sectional Map Amendment or whether they were notifying the MNCPPC and County that the use of the bogus zoning maps with the error in zoning would cause damages relating to the development of the subject property. The term 'bogus zoning map' is used to describe any zoning map that is not adopted and approved by the District Council, that statutory body who is the only governmental authority that can change zoning maps of any property in Prince George's County and then only with notice and a hearing.

[11]The building permit expired October 16, 1997.

over six (6) years from the denial of the permit in December, 1989, until the dismissal of this administrative appeal case in March, 1995.

V. '93 case – **U.S. DISTRICT COURT** – *Maenette B. Smith, et vir v. Maryland National Capital Park & Planning Commission, et al.*, Case No. MJG 93-742, in the Federal District Court in Baltimore. This was a case by your petitioners for damages under 42 U.S.C. 1983 and was dismissed without prejudice on September 28, 1993, by then counsel for the petitioners.

APPENDIX L

PARTIAL LISTING OF THE LITERATURE RELATING TO UNREPORTED/UNPUBLISHED DECISIONS

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APPENDIX M

IN THE CIRCUIT COURT
FOR PRINCE GEORGE'S COUNTY, MARYLAND

CAL 86-12679

MAGNETTE B. SMITH, et al,
Plaintiffs

vs.

MARYLAND NATIONAL CAPITAL
PARK & PLANNING COMMISSION,
Defendant.

REPORTER'S OFFICIAL TRANSCRIPT
OF PROCEEDINGS
(ORAL ARGUMENTS)

Upper Marlboro, Maryland
Thursday, December 11, 1986

BEFORE:
HONORABLE JOHN HANSON BRISCOE, Associate Judge

APPEARANCES:
For the Plaintiffs:
JESS JOSEPH SMITH, JR., ESQ.
For the Defendant:
THURMAN H. RHODES, ESQ.

NANCY E. TOLER
Official Court Reporter
P.O. Box 401
Upper Marlboro, Maryland, 20772

[2] PROCEEDINGS

THE DEPUTY CLERK: Civil Action Law 86-12679, Smith, et al, versus Maryland National Capital Park & Planning Commission.

THE COURT: For the record, gentlemen, if you will just state your presence and who you represent.

MR. SMITH: If the court please, my name is J. J. Smith. I represent the plaintiffs in this case, being Magnette B. Smith, et vir.

MR. RHODES: Thurman Rhodes representing Maryland National Capital Park & Planning Commission.

THE COURT: All, right, gentlemen, we are here today, the court has heard the matter of the appeal from the Maryland National Capital Park & Planning Commission hearing. It was the Park & Planning Commission, I believe, Mr. Rhodes. Is that a correct description of the body that heard this?

MR. RHODES: Actually, it was the Prince George's County Planning Board.

THE COURT: All right. It is an appeal from that board. It all comes under the famous multi-county Maryland National Capital Park & Planning Commission.

In any event, the petition is, in this case, Magnette B. Smith and husband, Joseph Smith, took an appeal from a decision by the board, which decision denied the application [3] for approval of subdivision of the property owned by the petitioners. The court heard from counsel on the record and both attorneys, both sides presented very comprehensive and very exhaustive memoranda and summaries of facts that were presented before the board at the July 10, 1986 meeting, at which time the planning board denied the subdivisions of Mr. and Mrs. Smith.

The court's responsibility is to look at the record and to determine whether or not the testimony and evidence

that was presented at that hearing was sufficient, was debateable and that the conclusions that the board came up with in this case, the denial, were based upon sufficient facts that did not render their decision arbitrary, capricious, illegal or discriminatory, because this courts responsibility is not to substitute its judgment for that of the administrative body, not to interpret the facts in its own way in substitution of that of the administrative body, only to make sure that the body had before it sufficient evidence to come to its conclusions.

The court has read very carefully, more than once, all of the testimony that was presented to the board on July 10, 1986. The court finds that the commission was duly organized, it had sent out appropriate notices and that all parties were present who were entitled to be present, and particularly, of course, the petitioner in this case, Mr. [4] Smith and Mrs. Smith. The court found the hearing to be conducted in a manner which certainly provided due process to both sides and the parties were given ample opportunities to be heard. The court finds that as a fact, but once we leave those facts, that I think everybody agrees to, then the court has a different outlook on the conclusions.

The two issues specifically this court has to look at, and those are the two issues that the board decided against the petitioner on, number one, was the failure to provide street widening along Church Street in accordance with and as counsel for the board refers to the section of the code Zoning Ordinance that provides that there be sufficient roadways or at least a fifty foot right of way or street for secondary subdivision.

Now, the court in looking at that one issue, to decide whether the board had sufficient evidence before it and testimony and laws and rules to come to the conclusion that that is one reason why the failure to provide for

street widening along Church Street was one of the reasons to justify the denial of the subdivision, the court looks at the whole picture. First of all, it looks at a similar situation just down the street to the corner, Maryland National Bank Subdivision, which, some one and a half to two years previous to this application was indeed approved. That Church Street, which everybody in, I think the County of [5] Prince George's agrees, including the town of Upper Marlboro, is, was and always will be a thirty foot street and will not be widened and therefore, the board felt that the Maryland National Bank could place its building in a way that not only initially would have violated the setback lines, but made no requirement of the Maryland National Bank subdivision to be bothered about the fact there was no fifty foot street there because if they, indeed, wanted to use that as a reason for either granting or not granting, they should have required the Maryland National Bank to ded-dedicate at least twenty feet of its property for future widening, if, indeed, that was ever to be an issue. Apparently, it was an issue with Mr. Smith's application.

The court finds great similarity in both applications, yet finds a very large degree of discrimination in that the Maryland National Bank was not only granted a setback variation, but in no way was required to dedicate any of its property for future widening of the thirty foot street known as Church street, and this court is familiar with the particular area and finds if there was ever any place that we want that street widened, which is probably one of the most congested areas in Upper Marlboro, it would be there, as opposed to the subdivision in question, which is a half a block away, up in a less congested area, and the petitioners desires and intentions that are clearly [6] of record as to what the petitioner wants to do with the property, he is going to create, in this courts opinion, a

desirable commercial establishment, which is zoned commercial now already by this very county, will be not only more desirable but will create a lot less traffic than the previously approved Maryland National Bank. In fact, the Maryland National Bank is now located, if the street was ever to be widened to fifty feet, the bank would lose some of its building, because the building is almost – I don't know, but there are very few feet between that street and the building, itself.

The court finds, and it has reviewed the record very carefully to make sure it was not straining its opinion in stating, there is, indeed, a very, very high degree of discrimination here. The court finds no rules, laws, regulations or facts that could justify and create a fairly debateable issue on the bank approval versus the approval before this court, so that part of their decision, the court finds there was not sufficient evidence, taking everything that was there at face value in opposition to this petition, the court finds no facts that could create a debateable situation that could permit any reabonable body or reasonable group of people hearing these facts to come to the conclusion that they should deny this petition because of a violation or a failure to be able to provide for street widening.

[7] The court also finds that Mr. Smith, the petitioner and his wife, were alleged to have not agreed to or refused to go along with even the possibility of the Church Street widening, and the court does not find that to be a fact. It is untrue, if the court is to believe the transcript of the record. I think Mr. Smith and his wife showed total flexibility to all of the reasonable suggestions of compromise and conditions for the approval of these subdivisions and the allegation that they were arbitrary or adamant about not doing so, is simply not true. The facts don't support it. They are not there. So the

court feels that issue no. 1, of the reasons why this petition was, or these subdivisions were not accepted, the court finds there was no evidence, facts written or oral, that could lead any reasonable person fairly debated, to come to a conclusion there is a reason for denying the application.

The second issue of the fact that there would be an adverse impact on the National Historic Register property if this proposal by Mr. and Mrs. Smith were to be borne into fruition, the court, again, looking at the entire record, finds it totally void of any such evidence by the appropriate people or organizations that did, in fact, create an atmosphere of fear on the part of the administrative body that this property would definitely have a very serious adverse effect on historic property and the historic register. The court finds [8] in the record nothing but some conjecture, some speculation that if, indeed, Mr. and Mrs. Smith went into this property and would not allow excavation of an adjoining yard for artifacts, and if they put up a building that was an eyesore, that it could even, at that, it could only possibly adversely effect property on the National Historic Register when, in fact, Mr. and Mrs. Smith, in their testimony before the board, did not say that archeology could not take place. Any property they had control over for historic purposes would not be and they would not agree to that. Further, the county has certainly a great deal of control at a future time over the kind of building, the height, the building permit, building code and all of the other myriad of regulations a person has to go through to build in this county, so the suggestion that Mr. and Mrs. Smith, what they want to do with this property is going to have an adverse effect, the court finds that even assuming all of the facts to be true, what they are planning on doing can only be an improvement

and an asset to the environment and to the asthetics, and certainly, then, to make the National Historic Landmark people happy because that street is not in its entirety a pretty street. The worst part of the street is down where this very board approved the Maryland National Bank building next to a High's store where, perhaps, some of you got tied up like I did for ten minutes this morning. [9] If the town of Upper Marlboro approved that, then I really suggest that perhaps they might want to set their priorities a little differently. The town of Upper Marlboro never really opposed this, they only suggested, and one of the members of the board suggested they would oppose it if certain things happened, but there never was opposition to this application, just a lot of inuendo, speculation, conjecture and some conclusions that were not supported by sufficient evidence in this court's mind. Therefore, in considering all of these factors, on these two issues, the court finds that this is a classic case of an administrative body not having sufficiently debateable evidence before it to come to the conclusions they did.

The court finds further that their decision was, in light of all that was in the transcript, was arbitary, it was capricious, and was discriminatory against the petitioners. The court therefore will reverse and overrule the planning board in their denial, their refusal to approve the subdivisions as applied for by Mr. and Mrs. Smith, and because of the courts failure to find hardly a scintilla of evidence there to support these findings, it would assess, and I will be glad to hear from counsel, if it is appropriate, or if it is not appropriate, but is legally possible to assess the costs of the appeal including the transcript to the appellees in this case.

[10] MR. SMITH: I don't desire that, Your Honor.

THE COURT: You have no desire to do that?

MR. SMITH: No, sir.

MR. RHODES: As a practical matter, I think those costs have already been absorbed by the agency.

THE COURT: If you need an order, the court will sign an order to that effect. Thank you. The disposition date is January 5.

(The proceeding was concluded at 10:30 a.m.)

APPENDIX N

[Filed Jan 14 1987]

IN THE CIRCUIT COURT
FOR PRINCE GEORGE'S COUNTY, MARYLAND

CAL 86-12679

MAENETTE B. SMITH, et vir.
Plaintiffs

vs.

MARYLAND-NATIONAL CAPITAL
PARK & PLANNING COMMISSION
Defendant

JUDGMENT

Upon consideration of the entirety of the record that was before the Planning Board of the Maryland-National Capital Park & Planning Commission, comprehensive Memorandum of Law filed by the Plaintiffs and Defendant and considered by the Court, counsel for both Plaintiff and Defendant having argued in open court, it is this 14th day of January, 1987, by the Circuit Court for Prince George's County, Maryland,

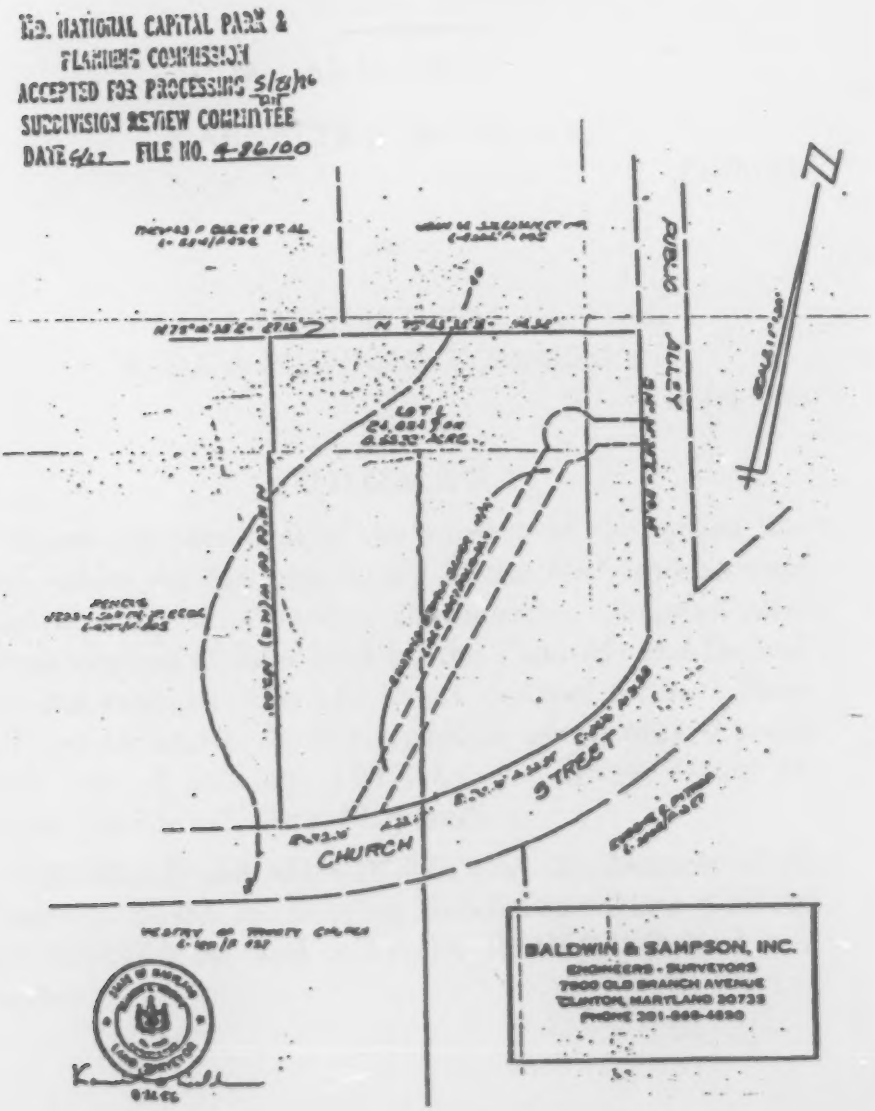
ORDERED and ADJUDGED, that the decision of the Planning Board in denying Subdivision Plats 4-86100 and 4-86101 be, and is hereby **REVERSED**; and it is further

ORDERED and ADJUDGED, that the Plaintiffs shall pay the costs of these proceedings.

/s/ [Illegible]
Judge

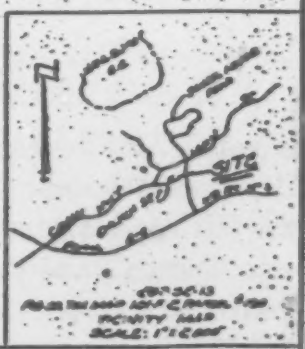
APPENDIX O

MAENETTE B. SMITH, et vir., v. MARYLAND-NATIONAL CAPITAL PARK & PLANNING COMMISSION, et al., CAE 89-24602,
[Filed, Nov. 16, 1990]



NOTES

1. OWNER
   JESSE J. SMITH, JR. ET UX.
   4915 MAIN STREET
   UPPER MARLBORO, MARYLAND 20772-0518
   TELEPHONE NO. OFF: 627-8200
2. LEGAL DESCRIPTION: LIBER 4745/FOLIO 804
3. EXISTING ZONE: C-S-C
4. W.S.S.C. SYSTEM AREAS: SEWER: 3A-1
   WATER: 3A-1
5. COMMERICAL USE
6. AREA: 24,031 SQ. FT. OR 0.2522 ACRE
7. TOPOGRAPHY: M.N.C.P.&P.C.
8. CONTOUR INTERVAL: 2 FEET
9. BOUNDARY BY BALDWIN & SANFORD
10. NO STORM WATER MGT. PROPOSED
11. NUMBER OF LOTS: ONE (1)



VICINITY MAP
SCALE: 1" = 2000'

PRELIMINARY PLAN
LOT 1
"MARLBOROUGH HOUSE"
LIBER 4745 FOLIO 804
MARL. BORO (7TH) DISTRICT
PRINCE GEORGE'S COUNTY, MARYLAND

DATE: MAY 19, 1980
SCALE: 1" = 30'
SHEET 1 OF 1
P-1964

AILABLE COPY

APPENDIX P

MAENETTE B. SMITH, et vir., v. MARYLAND-NATIONAL CAPITAL PARK & PLANNING COMMISSION, et al., CAE 89-24602,
[Filed, Dec. 20, 1990]

BEFORE THE BOARD OF APPEALS
FOR PRINCE GEORGE'S COUNTY, MARYLAND
Sitting as the Board of Zoning Appeals

Petitioner: Jess Joseph Smith, Jr. and Maenette B. Smith
Appeal No.: 10482
Heard: June 6, 1990; June 26, 1990; July 16, 1990; July 24, 1990; August 8, 1990
Decided: October 9, 1990
Board Members Present and Voting: Melvin Tanchel, Chairman; Elsie Conway, Vice Chairman, Robert Zugby, Member

ORDER OF THE BOARD

This appeal was brought to the Board of Appeals for Prince George's County, sitting as the Board of Zoning Appeals for the Maryland-Washington Regional District in Prince George's County, Maryland, requesting an appeal from the inaction or denial by the Department of Environmental Resources on BUilding Permit Application No. 10708-89-CGU and the Notice issued by the Department of Environmental Resources stating that the permit for the construction of an office building with parking lot at 14520 Church Street, Upper Marlboro, Prince George's County, Maryland, had been recommended for denial by The Maryland-National Capital Park and Planning Commission in Prince George's County.

The following testimony and evidence were presented to the Board for their consideration:

1. Petitioner filed for a building permit (No. 10708-89-CGU) in November, 1989.

2. After receiving the permit application, the Permits Office of the Department of Environmental Resources transferred copies of that permit to agencies that are required to respond in the approval or denial process for the permit. The Maryland-National Capital Park and Planning Commission (hereinafter referred to as Park and Planning) is one of the agencies required to respond.

3. In reviewing the permit, Park and Planning located the site on their own copy of the zoning map of the area. This zoning map was dated August 22, 1988.

4. It was explained that this 1988 map was comprised of a base map showing the outline of the properties/lots on it with an overlay of the approved zoning map of the area on top of the base map.

5. The approved zoning map for this area was adopted and approved by the District Council in 1977. (Petitioner's Exhibit No. 32)

6. The Clerk to the Council stated that the District Council is the body that is charged with the responsibility of adopting and approving zoning maps, that Park and Planning does not have the authority to adopt or approve zoning maps, that it is her responsibility as Clerk to the Council to maintain all of the records relating to adopted and approved zoning maps in Prince George's County, and that the map dated 7/12/77 (Petitioner's Exhibit No. 32a) is the latest zoning map for the subject property and surrounding area of Upper Marlboro.

7. In comparing the building permit site plan with the Park and Planning August 1988 map, Park and Planning

determined that a portion of Lot 1 - Marlborough House was located in the R-80 zone while the remainder of the lot was zoned C-S-C. Park and Planning then recommended denial of the building permit.

8. The Department of Environmental Resources was notified of the recommended denial.

9. The Department of Environmental Resources sent notice to the petitioner that the building permit application had been recommended for denial by Park and Planning.

10. The representative of the Department of Environmental Resources stated that they rely on Park and Planning to make recommendations and decisions on zoning matters, and that although the Department of Environmental Resources has overridden Park and Planning on minor issues after receiving Park and Planning's recommended denial, the Department of Environmental Resources has not overridden Park and Planning on major issues or items. The recommended denial by Park and Planning in the subject appeal is a major issue.

11. Park and Planning stated that it does not have the authority to approve or deny a building permit application, but that the Department of Environmental Resources is the agency charged with approving or denying the permit. Therefore, Park and Planning contends that the appeal should be dismissed, since they have not denied the permit.

12. The representative of the Department of Environmental Resources stated that their agency would not override the recommendation of Park and Planning and therefore, that recommendation would stand as the decision of that agency.

13. Park and Planning also questioned the jurisdiction of the Board to hear the appeal in that the Board did not have the authority to change a zoning map.

14. Lot 1 – Content and Lot 1 – Marlborough House were one parcel at the time of the 1977 zoning. At that time part of the property was zoned R-80 and part of it was zoned C-S-C.

15. Petitioner subdivided the property in 1987 into two lots, namely: Lot 1 – Content and Lot 1 – Marlborough House. The record plat for Lot 1 – Content was recorded July, 1987. The record plat for Lot 1 – Marlborough House was recorded July, 1988.

16. Park and Planning contends that lot line between Lot 1 – Content and Lot 1 – Marlborough House and not the zoning line was not correctly located when the property was subdivided.

17. Park and Planning stated that the zoning line is located 400 feet from the center line of Water Street. This is correctly shown on County Exhibits No. 10 and 11, and Petitioner's Exhibit No. 32.

18. The representative of the Permits division of Park and Planning stated that the subject lots were placed on the base map (County Exhibit No. 10) incorrectly, and that they were correctly placed on the base map in County Exhibit No. 11.

19. County Exhibit No. 10 is the August, 1988 Park and Planning map. County Exhibit No. 11 is the March 16, 1990 Park and Planning map.

20. Park and Planning stated that the base maps are updated at frequent intervals based on the best information available at that time. The base map for the area of the subject property was not updated from July 1977

until August 1988. This was a result of the subdivision of the subject properties.

21. It was explained that the zoning on the properties of petitioner has not changed since July 1977.

22. It was also stated that the County Council does not prepare zoning maps or any maps. They have charged the Park and Planning Commission with doing this.

23. The base map show property lines and street locations.

24. Petitioner stated that when the property was subdivided into two lots, the property was located on the July 1977 zoning map which was the official zoning map for the area (Petitioner's Exhibit No. 32) and the lot line dividing the property into two lots was placed where the zoning line was located going through the property.

After hearing all the testimony and reviewing the evidence presented, the Board finds that:

1. Petitioner applied for a building permit to construct an office building on Lot 1 – Marlborough House. The permit was referred to several agencies for review. One of the agencies that reviewed the permit application was Park and Planning.

2. In reviewing the permit application and comparing the submitted site plan to the August, 1988 base map with zoning overlay, a decision was made by a representative of the Park and Planning Commission that a portion of the subject property was zoned R-80 while the remainder of the lot was zoned C-S-C.

3. As a result of this comparison, Park and Planning recommended denial of the requested building permit.

4. The Department of Environmental Resources was notified of this recommended denial. The department

then notified the petitioner of the decision of Park and Planning.

5. Section 27-229(a)(2) of the Prince George's County Code authorizes the Board to hear and decide appeals where it is alleged that, in the administration of this Subtitle, there is error in the refusal of a building or use and occupancy permit, or in any other decision of the Department of Environmental Resources, the Planning Board, or any other person or body authorized to administer this Subtitle. Therefore, the Board has jurisdiction to hear this appeal.

6. The Board is not, in reaching a decision on this appeal, amending any of the provisions of this Subtitle or the Zoning Map, but only deciding whether an error occurred.

7. The August, 1988 base map with zoning overlay was updated in March, 1990 by Park and Planning. When the building permit site plan was compared to this updated map, Park and Planning determined that more of the subject property was located in the C-S-C zone and that there was less land in the R-80 zone. The angle of the lot lines also changed.

8. The official zoning map for the area is the 1977 zoning map kept in the Office of the Clerk to the Council.

9. A comparison of the official zoning map to the August, 1988 and March, 1990 Park and Planning maps shows that not only the lot lines for the subject properties (Lot 1 – Content and Lot 1 – Marlborough House) had been changed, but also the width of the other lots between the side lot line of Lot 1 – Content and Old Crain Highway on Church Street.

10. The western side lot line of Lot 1 – Content and therefore, the western side lot line of Lot 1 – Marlborough House are located closer to Old Crain Highway

on the August, 1988 and March 1990 Park and Planning maps then they are on the official zoning map.

11. By moving the lot lines on the base map prepared by the Mapping and Graphics Division of the Park and Planning Commission and then overlaying the official zoning map lines, the result creates more than one zoning classification on Lot 1 – Marlborough House. The Park and Planning map also locates the lot lines on an angle instead of perpendicular to Church Street.

12. A comparison of the official zoning map and the building permit site plan, locates all of Lot 1 – Marlborough House in the C-S-C zoning category.

13. The zoning line on the official zoning map is 400 feet from the center line of Water Street. This line has not changed.

14. An error occurred in changing the lot lines for the properties along the northern boundary of Church Street, and in particular, the lot lines for Lot 1 – Content and Lot 1 – Marlborough House.

THE BOARD THEREFORE RESOLVED, by majority vote (Mrs. Conway in the minority), that an error had occurred and the Notice issued by the Department of Environmental Resources stating that Building Permit No. 10708-89-CGU had been recommended for denial by The Maryland-National Capital Park and Planning Commission for the construction of an office building with parking at 14520 Church Street, Upper Marlboro, Prince George's County, Maryland, is hereby OVERRULED.

BOARD OF ZONING APPEALS

By /s/ Melvin Tanchel
Melvin Tanchel, Chairman

APPENDIX Q

[Filed Jan. 30, 1995]

IN THE CIRCUIT COURT
FOR PRINCE GEORGE'S COUNTY, MARYLAND

CAL 91-00205

Prince George's County, Maryland
Appellant and Cross-Appellee

v.

Jess Joseph Smith, Jr. and Maenette B. Smith,
Appellees and Cross-Appellants.

APPELLANT'S MOTION TO WITHDRAW APPEAL

Comes now Appellant, Prince George's County, Maryland, by and through its undersigned counsel, to respectfully withdraw its appeal in the instant matter. As grounds for said Motion, Appellant states as follows:

1. On or about December 9, 1994, Appellant filed a Motion to Dismiss the instant appeal as moot.

2. In response to said Motion, Appellees filed a Motion to Dismiss Appellant's appeal as moot. Appellees' Motion also noted that Appellees have withdrawn their cross-appeal in the above-captioned matter.

3. Inasmuch as Appellees have withdrawn their cross-appeal, Appellant also withdraws its above-captioned appeal.

4. Hence, the above-captioned appeal should respectfully be dismissed.

WHEREFORE, Appellant respectfully request that the Court dismiss the instant appeal in that both parties have now withdrawn their respective appeals.

Respectfully submitted,

PRINCE GEORGE'S COUNTY, MARYLAND
Michael P. Whalen
County Attorney

By: /s/ Albert J. Lochte / JMD
Albert J. Lochte
Deputy County Attorney

By: /s/ J. Michael Dougherty
J. Michael Dougherty, Jr.
Associate County Attorney

Office of Law
County Administration Building
14741 Gov. Oden Bowie Drive
Upper Marlboro, Maryland 20772
(301) 952-4124

/s/ Isaac H. Marks
Isaac H. Marks, Esquire

6600 Kenilworth Avenue
Riverdale, Maryland 20737
(301) 699-2577

Co-counsel with Appellant

POINTS AND AUTHORITIES

1. The record herein.

[Certificate of Service Omitted in Printing]

APPENDIX R

[Filed Feb. 28, 1992]

IN THE
COURT OF SPECIAL APPEALS
OF MARYLAND

September Term
No. 1430

Maenette B. Smith, et vir.
Appellants

v.

Maryland-National Capital
Park & Planning Commission, et al.
Appellees

Appeal from the Circuit Court for
Prince George's County
George W. Bowling, Judge

BRIEF OF APPELLEES

– Attorneys for Appellees –

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* * *

Therefore, Appellees respectfully request that the Circuit Court's order dismissing Appellants' complaint be affirmed.

Respectfully submitted,

PRINCE GEORGE'S COUNTY COUNCIL,
SITTING AS THE DISTRICT COUNCIL

/s/ Joyce B. Nichols (NE)
Joyce Birkel Nichols
Principal Counsel to the District Counsel

/s/ Maurene Epps
Maurene Epps
Deputy Counsel to the District Counsel

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PRINCE GEORGE'S COUNTY, MARYLAND

Michael P. Whalen
County Attorney

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THE MARYLAND-NATIONAL CAPITAL
PARK AND PLANNING COMMISSION

Ronald D. Schiff
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/s/ Elizabeth M. Hewlett
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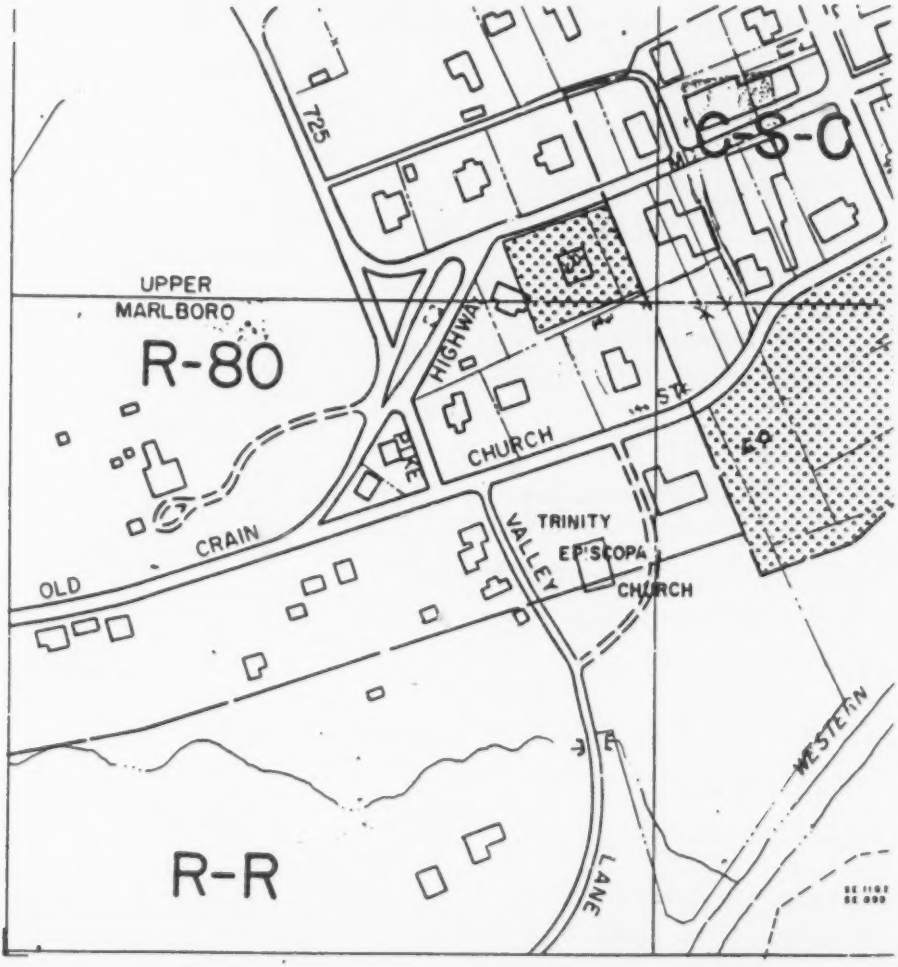
[Certificate of Service Omitted in Printing]

APPENDIX S

MAENETTE B. SMITH, et vir. v. MARYLAND-NATIONAL CAPITAL PARK & PLANNING COMMISSION, et al., CAE 89-24602, [Filed, Nov. 16, 1990]



207 SE 13

ORIGINAL COPY

BASE MAP LATEST UPDATE 7-12-77

ZONE MAP LATEST UPDATE 11-30 76

207 SE 141

APPENDIX T

MAENETTE B. SMITH, et vir. v. MARYLAND-NATIONAL CAPITAL PARK & PLANNING COMMISSION, et al., CAE 89-24602, [Filed, Nov. 16, 1990]

14580 Church st

1-24-90
10708-87-CDU

#1. Special exception required for parking in the residential zone. Page 11-32 On the new manual requires that Special exception uses conform to the landscape manual per CB-1-1989;

#2. Per Sec 2.2.a of the Landscape Manual;
a location, general type and quality of existing vegetation;
b. schedules or lists showing required and proposed quantities for items called for by this manual. For example see sec 2.2.c;
c location, size and discription of all elements which are required to be screened by sec 4.4 of this manual (page 140);

Page 34
OK #3. Street landscaping is OK;

OK #4. North property line does abut a compatable use. (OK)

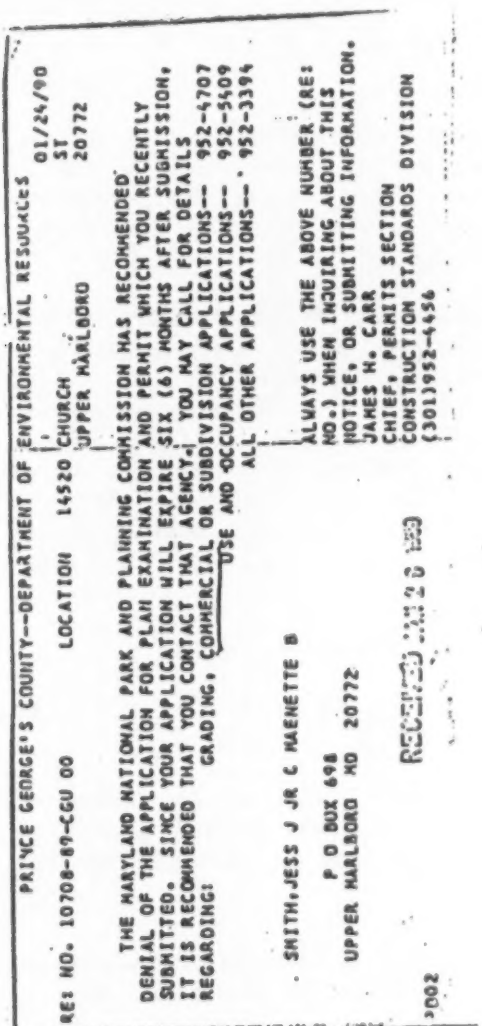
#5. The R-80 portion of the parking lot must meet the setback and buffer yard for type C (see table IV page 57).

Screening
#6. Per Sec 4.4 Electric Transformer box must be screened per the above sec.

Dave comments to J.J. Smith 1-29-90

APPENDIX U

MAENETTE B. SMITH, et vir. v. MARYLAND-NATIONAL CAPITAL PARK & PLANNING COMMISSION, et al., CAE 89-24602, [Filed, Nov. 16, 1990]



PRINCE GEORGE'S COUNTY--DEPARTMENT OF ENVIRONMENTAL RESOURCES 01/24/90

RE: NO. 10708-89-CGU 00 LOCATION 14520 CHURCH ST
UPPER MARLBORO 20772

THE MARYLAND NATIONAL PARK AND PLANNING COMMISSION HAS RECOMMENDED DENIAL OF THE APPLICATION FOR PLAN EXAMINATION AND PERMIT WHICH YOU RECENTLY SUBMITTED. SINCE YOUR APPLICATION WILL EXPIRE SIX (6) MONTHS AFTER SUBMISSION, IT IS RECOMMENDED THAT YOU CONTACT THAT AGENCY. YOU MAY CALL FOR DETAILS REGARDING: GRADING, COMMERCIAL OR SUBDIVISION APPLICATIONS-- 952-4707
USE AND OCCUPANCY APPLICATIONS-- 952-5409
ALL OTHER APPLICATIONS-- 952-3394

SMITH,JESS J JR & MAENETTE B

P O BOX 698

UPPER MARLBORO MD 20772

ALWAYS USE THE ABOVE NUMBER (RE: NO.) WHEN INQUIRING ABOUT THIS NOTICE, OR SUBMITTING INFORMATION.
JAMES H. CARR
CHIEF, PERMITS SECTION
CONSTRUCTION STANDARDS DIVISION
(301)952-4456

RECEIVED [illegible]

3002

APPENDIX V

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S Constitution
Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

No State shall make or enforce any law, which shall abridge the privileges or immunities of citizens of United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES CODE
(1994)
TITLE 42

§ 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

MARYLAND CONSTITUTION
(Michie 1997 Repl. Vol.)

Article IV

Section 18. Powers and duties of Chief Judge of Court of Appeals; assignment of judges; rule-making power of Court of Appeals.

(a) The Court of Appeals from time to time shall adopt rules and regulations concerning the practice and procedure in and the administration of the appellate courts and in the other courts of this State, which shall have the force of law until rescinded, changed or modified by the Court of Appeals or otherwise by law. The power of courts other than the Court of Appeals to make rules of practice and procedure, or administrative rules, shall be subject to the rules and regulations adopted by the Court of Appeals or otherwise by law.

(b) The Chief Judge of the Court of Appeals shall be the administrative head of the Judicial system of the State. He shall from time to time require, from each of the judges of the

Circuit Courts, of the District Court and of any intermediate courts of appeal, reports as to the judicial work and business of each of the judges and their respective courts. He may, in case of a vacancy, or of the illness, disqualification or other absence of a judge or for the purpose of relieving an accumulation of business in any court assign any judge except a judge of the Orphans' Court to sit temporarily in any court except an Orphans' Court. Any judge assigned by the Chief Judge of the Court of Appeals pursuant to this section has all the power and authority pertaining to a judge of the court to which he is so assigned; and his power and authority shall continue with respect to all cases (including any motion, or other matters incidental thereto) which may come before him by virtue of such assignment until his action thereon shall be completed. In the absence of the Chief Judge of the Court of Appeals, the provisions of this section shall be applicable to the senior judge present in the Court of Appeals. The powers of the Chief Judge set forth in this section shall be subject to any rule or regulation adopted by the Court of Appeals.

MARYLAND CONSTITUTION
DECLARATION OF RIGHTS
(Michie 1997 Repl. Vol.)

Article 23

Jury judges of law and fact; right of trial by jury in civil proceedings.

In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction.

The right of trial by Jury of all issues of fact in civil proceedings in the several Courts of Law in this State, where

the amount in controversy exceeds the sum of five thousand dollars, shall be inviolably preserved.

Article 24

Due process.

That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land.

ANNOTATED CODE of MARYLAND
(Michie 1997 Repl. Vol.)

Article 28

§ 1-101. Commission continued as a body corporate.

The Maryland-National Capital Park and Planning Commission is continued as a body corporate, to have and exercise the powers, duties, and functions provided in this article. It is the same agency as that with the same name created by Chapter 448 of the Acts of the General Assembly of Maryland of 1927, as subsequently amended from time to time. Hereafter in this article it may be referred to as "the Commission" or as "Commission".

§ 7-111. County planning boards.

(a) Membership and powers.- The members of the Commission appointed by the governing bodies of each

county are designated the Montgomery County planning board and the Prince George's County planning board, respectively. They are responsible for planning, platting, and zoning functions primarily local in scope, as distinguished from the regional planning functions of the Commission relating to or affecting the regional district as a planning unit. The local functions exclusively within the jurisdiction of the respective planning boards include, but are not limited to, the administration of subdivision regulations, the preparation and adoption of recommendations to the district council with respect to zoning map amendments, and the assignment of street names and house numbers within the regional district. The respective county planning boards have exclusive jurisdiction over mandatory referrals made pursuant to § 7-112 of this title by their respective county governments or any agency thereof; and, as to the Montgomery County planning board, by the County Board of Education, by any municipality or special taxing district, or by any public utility, whether publicly or privately owned. The Montgomery County planning board shall review the annual capital budgets of the county and future projections thereof and submit recommendations to its county governing body, provided that the responsibility for preparing the capital budgets and programs of public works shall be vested in the county government and its administrative, fiscal, and planning staffs and not in the staff of the Commission and the county planning board. The county planning boards shall meet from time to time with their respective county governing bodies and perform surveys, studies, and other planning duties the governing bodies assign to them.

(b) Regional functions; procedure for Commission.- The regional functions within the jurisdiction of the Commission include, but are not to be limited to, preparation, adoption, and amendment of the general plan for the physical development of the district, or parts thereof, in accordance with § 7-108 of this title; and mandatory referrals from the

United States or the State of Maryland, or any agency thereof, pursuant to § 7-112 of this title. The Commission and the county planning boards, or either of them, may recommend to the proper authorities text amendments to the zoning ordinances, subdivision regulations, and any other rules and regulations authorized in this title. The adoption of a resolution or recommendation respecting a regional matter shall be carried by the affirmative votes of not less than six members of the Commission, of whom not less than three members shall be from Montgomery County and not less than three members from Prince George's County. However, when a regional plan affects one county only, the affirmative vote of three members of the local planning board for the county affected shall be controlling. Within its jurisdiction, each county planning board shall have and exercise the powers in regard to planning, zoning, subdivision control, platting, the assignment of street names and house numbers, and related matters, heretofore exercised by the Commission under this title.

(c) Jurisdiction over personnel of planning boards; Prince George's County; Montgomery County.-

(1) Each planning board shall have administrative control and jurisdiction over personnel performing the duties and functions assigned in this section to the respective planning boards.

(2) (i) In this paragraph, "deputy director" includes any position comparable to the position of a deputy director, as determined by the Prince George's County planning board.

(ii) In Prince George's County, a director or deputy director of a department shall have education or professional experience in a field relevant to the responsibilities of that department.

(iii) A director or deputy director shall receive the compensation established in the budget for the Prince George's County planning board.

(iv) 1. Except as provided in item 2 of this subparagraph, a director or deputy director shall be appointed by and serve at the pleasure of the Prince George's County planning board.
2. In Prince George's County, an individual may elect to remain in the merit system established under § 2-112 of this article if:
A. On June 30, 1991, the individual is a director of planning or a director of parks and recreation; or
B. On June 30, 1996, the individual is a deputy director of planning or a deputy director of parks and recreation.
(3) (i) Subject to subparagraph (ii) of this paragraph, in Montgomery County, a director serves at the pleasure of the Montgomery County planning board.
(ii) Any individual who, on July 1, 1995, held a position affected by this paragraph may elect to remain in the merit system established under § 2-112 of this article.
(d) Parks and park lands excepted.- Nothing in this section may be deemed to affect powers and duties of the Commission with respect to parks and park lands. The Commission, however, may delegate to the respective planning boards such powers and duties with respect to parks and park lands as the Commission may, from time to time, determine. The Prince George's County planning board shall provide a program of recreation within Prince George's County, and coordinate the program with the Commission's park functions.
(e) Expenses of local planning boards.- The expenses of operation of the respective local planning boards shall be paid from the proceeds of the administrative tax collected for the Commission and from funds appropriated, in addition thereto, by the respective county governing bodies.
(f) Allocation of other functions.- Functions not specifically allocated in this section shall be assigned by resolution of the Commission with the approval of the respective county governing bodies either to the Commission itself or to one or both of the county planning boards, as the occasion may

arise, so as to effectuate the concept that planning functions which are essentially local or intracounty should be performed by the county planning boards.

(g) Compensation of local planning board members.- Notwithstanding other provisions of this article, funds may be included in the Commission's annual budget and appropriated by the respective county governing bodies to provide an annual salary of $12,900 for each planning board member, other than a full-time member, as compensation for the planning board member's services.

(h) Montgomery County.- In Montgomery County, to the extent authorized by county law, ordinance, or resolution, the planning board may:

(1) Administer and enforce any adopted growth policy or forest conservation program; and

(2) Provide staffing assistance on matters relating to the promotion of historic preservation.

§ 8-101. Powers generally.

(a) Designation of district councils; bi-county district council.- The County Councils of Montgomery County and Prince George's County are each individually designated, for the purposes of this article, as the district council for that portion of the regional district lying within each county, respectively. Sitting together, they are jointly designated, for the special purposes delineated in this article, as the bi-county district council for the entire Maryland-Washington Regional District. The adoption of an ordinance or resolution by the bi-county district council shall be accomplished only by the affirmative votes of a majority of the total membership of each district council.

(b) Grant of zoning power.-

(1) In this subsection, the term "zoning classification of agricultural open space" means a zoning classification in

which uses are limited to those permissible in the agricultural open space portion of an agricultural preservation development under § 27-445.01 of the Prince George's County Code (1991 Edition, as amended).

(2) Except as otherwise provided in §§ 8-126 and 8-127 of this subtitle, each district council, respectively, in accordance with the conditions and procedures specified in this article, may by ordinance adopt and amend the text of the zoning ordinance and may by resolution or ordinance adopt and amend the map or maps accompanying the zoning ordinance text to regulate, in the portion of the regional district lying within its county, (i) the location, height, bulk, and size of buildings, other structures, and units therein, building lines, minimum frontages, depths and areas of lots, and percentages of lots which may be occupied; (ii) the size of lots, yards, courts, and other open spaces; (iii) the erection of temporary stands and structures; (iv) the density and distribution of population; (v) the location and uses of buildings and structures and units therein for trade, industry, residence, recreation, agriculture, public activities, and other purposes; and (vi) the uses of land, including surface, subsurface, and air rights therein, for building, trade, industry, residence, recreation, agriculture, forestry, or other purposes.

(3) The powers granted by this subsection include the power to establish a program for the transfer of development rights.

(4) No regulation may prohibit the use of any land by the owner of such land or the holder of any easement or right therein or the owner's or holder's tenant for farming, other agricultural uses exclusively, or within Prince George's County, for the purposes of storing natural or artificial gas at a level below 500 feet from the surface of the earth.

(5) The County Council for Montgomery County, sitting as a district council, may not receive an application for a zoning map amendment upon the same land which has been the subject of a previous zoning application for map amendment filed after June 1, 1965, for the same zoning classification

upon which there was a decision on the merits unless 36 months have expired since the filing of the application for the previous zoning map amendment upon which there was a decision on the merits. Further, an application for a zoning map amendment filed with the County Council for Montgomery County, sitting as a district council, shall set forth the names of all persons having a substantial interest in the subject property of the application, such substantial interest to include all those persons with a share in such property amounting to five percent or more whether held in an individual or corporate capacity of the full cash value of such property exclusive of all mortgages, deeds of trust, liens and encumbrances. It shall also set forth the names of all contract purchasers and all those persons holding a mortgage, a deed of trust, or an option to purchase the property. However, the aforegoing time limitation and name requirement do not apply to applications filed by the district council or by the Commission.

(c) Power to regulate for the protection of historical, archeological, etc., sites, structures or districts.- In order to protect the historical, archeological, architectural or cultural heritage of areas in Montgomery and Prince George's Counties comprising the regional district and to preserve and enhance the quality of life in the community, in addition to any power or authority of the district councils to regulate by ordinance, planning, zoning or subdivision, each district council may provide by ordinance regulations for the protection, preservation and enhancement of sites, structures with their appurtenances and environmental settings, or districts of historical, archeological, architectural or cultural value designated on the adopted and approved general plan. The enactment and application of these regulations shall be reasonable and appropriate to the purpose of this section and are limited to the protection, preservation and enhancement of the exterior of the sites, structures or districts, and, if such

action constitutes a taking of private property, provision shall be made for just compensation.

§ 8-104. Amendments to zoning regulations - Generally.

(a) Authorized procedure.-
(1) After duly advertised public hearing each district council from time to time may amend its regulations or any regulation, including the maps or any map, in accordance with procedures established in the respective zoning ordinances. The procedures and ordinances may include, but not be limited to: (i) procedures limiting the times during which amendments may be adopted; (ii) provisions for hearings and preliminary determinations by an examiner, board or other agency; (iii) procedures for quorums, number of votes required to enact amendments and variations or increases therein based upon such factors as master plans, recommendations of the hearing examiner, planning board, municipality, or other body, and petitions of abutting property owners, and the evidentiary value which may be accorded to any or all of these; and (iv) procedures for hearing, notice, costs, and fees, amendment of applications, stenographic records, reverter, lapse, and reconsideration de novo of undeveloped zoning amendments. The existing provisions of the Regional District Law and of the ordinances enacted by the respective district councils relating to the aforegoing matters shall remain in full force and effect unless or until specifically superseded or amended in accordance with the power and authority granted herein, but no such amendment may be made by a district council, in a year in which the council is elected, after the 31st day of October and until the newly elected council is duly qualified and has taken office.
(2) In Montgomery County all applications which seek a zoning classification, either euclidean or floating, other than that which is indicated to be appropriate or suitable in the text

or on the land use map of an adopted master plan, approved by the district council, under the provisions of § 7-108 (e) of this article, shall be granted only by the affirmative vote of 6 members of the district council. If the application for reclassification is recommended for approval by the Commission or if the application is for a zoning classification created after the approval of the master plan by the council, then an affirmative vote of 5 members of the district council is required to grant the application or applications. In all other cases, an application may not be granted except by affirmative vote of at least 5 members of the district council.

(3) In Prince George's County the district council shall require:

(i) A two-thirds vote of all members of the district council to approve a zoning map amendment if the zoning map amendment is contrary to an approved master plan;

(ii) A two-thirds vote of all members of the district council to approve a zoning map amendment or a special exception if the zoning map amendment or special exception is contrary to the recommendation of a municipal corporation that has any portion of the land subject to the zoning map amendment or special exception within the municipal boundaries; and

(iii) A two-thirds vote of all members of the district council and a four-fifths vote of all members of the planning board to approve an optional parking plan if the optional parking plan is contrary to the recommendation of a municipal corporation that has any portion of the land subject to the optional parking plan within the municipal boundaries.

(b) Referral to planning boards and municipalities.- Before any map amendment is passed it shall be submitted to the appropriate planning board and to the governing body of the incorporated municipality in which the land is located, for approval, disapproval, or suggestions.

Each district council may provide by ordinance procedures to be followed by the planning boards and municipalities in considering zoning map amendments to the extent that these

provisions are not in conflict with the provisions of this article.

(c) Referral to incorporated municipalities.- Before the district council of the Maryland-Washington Regional District in Montgomery County and Prince George's County may amend the zoning ordinance of either county by changing the zoning classification of property within any incorporated municipality, the application for the change shall be referred to the governing body of the incorporated municipality for its recommendation, allowing the governing body 60 days in which to make its recommendation. However, a two-thirds majority of all the members of the district council is required before the council may change the zoning classification of property within any incorporated municipality contrary to the recommendation of the municipality. For purposes of this section the term "incorporated municipality" includes any city, town, village, or special taxing area which has an elected local governing body and performs general municipal functions.

(d) Custodian; availability of records and copies of documents in Prince George's County.-

(1) In this subsection, "custodian" means the custodian of the records of a zoning map amendment case in Prince George's County.

(2) Before the Commission sends a zoning map amendment case to the district council in Prince George's County, the Commission is the custodian of the records of the case. After the Commission sends a zoning map amendment case to the district council in Prince George's County, the district council is the custodian of the records of the case.

(3) (i) Correspondence or documents submitted to a custodian shall be received only in accordance with any applicable statute, ordinance, rule of evidence, or case law.

(ii) All applications for zoning map amendments and all official correspondence and records relating thereto, prepared or received by the custodian, shall be made available to the

public during regular business hours of the custodian, but the custodian may publish rules to prevent this access from unreasonably disrupting its official business. However, under any circumstances, copies of technical staff reports shall be available at the office of the custodian for the public.

(4) (i) In Prince George's County, a person who personally appears at the office of the custodian may obtain, without charge, a copy of a public document if the document:

1. Is of letter or legal size; and

2. Pertains to a specific zoning case, including zoning applications and justification statements.

(ii) The purpose of subparagraph (i) is to supplement any present laws, rules, or policies that the custodian follows when making public documents available.

(e) Conditional zoning in Prince George's County.-

(1) In approving any local map amendment after July 1, 1968, under this section, the district council for Prince George's County may give consideration to and adopt whatever reasonable requirements, safeguards, and conditions as may in its opinion be necessary either to protect surrounding properties from adverse effects which might accrue from the zoning amendment, or which would further enhance the coordinated, harmonious, and systematic development of the regional district. A statement of these conditions shall be included in the resolution granting the amendment and shall become a part thereof, and remain in effect for so long as the property remains zoned in accordance with the resolution and the applicable zoning classification requested. No building permit, use permit, or subdivision plat may be issued or approved for the property except in accordance with conditions set forth in the resolution. The district council may adopt ordinances and regulations necessary to provide adequate notice, public hearings, and enforcement procedures for the implementation of this section.

(2) An applicant has 90 days from date of approval to accept or reject the land use classification conditionally approved.

Should the applicant expressly reject the amendment as conditionally approved within the 90-day period, the zoning classification shall revert to its prior status.

(3) Notwithstanding any other provision of this article no requirements, safeguards or conditions may be imposed by the district council which would require the dedication of land for public use except for roads, streets, alleys, and easements.

(4) If any resolution, or any part or condition thereof, passed by the district council pursuant to this subsection is declared illegal, unconstitutional, or in any way invalid by any court of competent jurisdiction, the zoning category applicable to the property rezoned by the resolution shall revert back to the category applicable prior to the passage of the resolution, and the resolution shall be null and void and of no effect whatsoever.

(f) Regulation of signs and fences by municipalities in Prince George's County.- In Prince George's County, municipal corporations, as defined in Article 23A, § 9 (a), shall have concurrent authority within their boundaries with the Department of Inspections and Permits of Prince George's County to seek compliance with zoning requirements insofar as these requirements pertain to signs. Such municipalities may also enact legislation regulating fences erected in front of the building setback lines on all residential property located within the municipality. Enacted ordinances may not be less restrictive than any ordinance in effect or thereafter enacted by the County Council of Prince George's County.

§ 8-106. Same - Hearings and appeals in Prince George's County.

(a) Stenographic record.- In Prince George's County there shall be a stenographic record made by a duly authorized and competent stenographer or reporter of all hearings on petitions for zoning map amendments as provided herein. The

stenographic record made may not be destroyed until the time for appeal or rehearing on any petition for zoning map amendments has expired.

(b) Filing fees; transcript.- The person, corporation, or party making application for a zoning map amendment at the time of paying the advertising costs shall pay an additional filing fee of $5. Any person, corporation, or party noting an appeal from the decision of the district council, or who or which for any reason requests a transcript to be transcribed as herein provided, shall pay to the county the cost of estimated costs of transcribing the stenographic record.

(c) Notice to nearby property owners.- Each district council may include in its regulations provisions for additional notice of the public hearing on any proposal for amendment of its zoning plan or regulations, to be given to the owners (as they appear on the assessment rolls of the county) of properties adjoining or across the road from, or in the same block as, or in the general vicinity of, the properties involved in the proposed amendment. The notice may be given by mail or by posting of the notice on or in the vicinity of the properties involved in the proposal, or both.

(d) Definitions for sections.- For purposes of this section and §§ 8-104 and 8-105 of this article herein, the word "amend" or "amendment" shall be deemed to include any modification of the text or phraseology of a regulation or of any provision of the regulations, or any repeal or elimination of any regulation or part thereof, or any addition to the regulations, or any new regulation, or any change in the number, shape, boundary, or area of the districts, or of any district, or any repeal or abolition of any map or part thereof, or any addition to any map, or any new map, or any other change in the map or maps. For the purpose of this and other sections of this title the words "regulate", "regulation", or "regulations" shall be deemed to include "restrict", "restrictions", "limit", "limitations", "prohibit" and "prohibitions".

(e) Appeals authorized.- In Prince George's County, any incorporated municipality located in Prince George's County, any person or taxpayer in Prince George's County, any civic or homeowners association representing property owners affected by a final district council decision, and, if aggrieved, the applicant may have judicial review of any final decision of the district council. Proceedings for review shall be instituted by filing a petition in the Circuit Court of Prince George's County within 30 days after service of the final decision of the district council, which may be served upon all persons of record at the district council's hearing. Copies of the petition shall be served on the district council and all other persons of record in the manner provided by the rules of court. The filing of the petition does not stay enforcement of the district council's decision; but the district council may do so, or the reviewing court may order a stay upon terms it deems proper.

(f) Procedure for appeals.- Within 30 days of service of a petition or within whatever further time as the court may allow, the district council shall transmit to the reviewing court the original or a certified copy of the entire record of proceeding under review. By stipulation of all parties to the review proceeding, the record may be shortened. Any party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional cost. The court may require or permit subsequent corrections to the record when deemed advisable.

(g) Taking additional evidence.- If written application by petition to show cause is made to the court before the date set for hearing for leave to present additional evidence on the issues in the case either by the party appealing or any party in interest, and if it is shown to the satisfaction of the court after a hearing thereon that the additional evidence is material and that there were good reasons for failure to present it in the proceedings before the district council, the court shall order that the additional evidence be taken before the district council upon conditions which the court deems proper, and

the case shall be forthwith remanded to the district council for the taking of additional testimony. In cases in which the additional evidence is taken before the district council, the district council may modify or reverse its previous findings and decision by reason of the additional evidence and shall file with the reviewing court, to become part of the record, the additional evidence together with any modifications or new findings or decision.

(h) Court procedure.- The review shall be conducted by the court without a jury. In cases of alleged irregularities in procedure before the district council not shown in the record, testimony thereon may be taken in the court. The court upon request shall hear oral argument and receive written briefs.

(i) Court's action.- The court may affirm the decision of the district council or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners have been prejudiced because the administrative findings, inferences, conclusions, or decisions are (1) in violation of constitutional provisions; or (2) in excess of the statutory authority or jurisdiction of the agency; or (3) made upon unlawful procedure; or (4) affected by other error of law; or (5) unsupported by competent, material and substantial evidence in view of the entire record as submitted; or (6) arbitrary or capricious.

(j) Further right of appeal.- In Prince George's County, the district council, the applicant, or any party to the circuit court review who is an aggrieved party may secure a review of any final judgment of the Prince George's County Circuit Court under this title by appeal to the Court of Special Appeals. The appeal shall be taken in the manner provided by law for appeals from law courts in other civil cases. Each member of the district council in Prince George's County is entitled to vote on whether the district council shall appeal to the Court of Special Appeals, regardless of whether the member participated in the hearing on the matter or in the decision.

(k) Applicability.- This section applies only in that portion of the regional district that lies within Prince George's County.

§ 8-119. Building permits generally; zoning permits and certificates.

(a) Building permits required.- A building or other structure may not be erected or structurally altered in the regional district without the issuance of a building permit, and a permit may not be given except in conformity with the provisions of this article and of the regulations enacted by the respective district councils. A building permit is not required for buildings and structures to be used exclusively for purposes of agriculture upon land used exclusively for agriculture. In any part of the regional district in which there does not now exist provision of law or ordinance designating an administrative official by whom building permits are to be issued, the appropriate district council shall designate this official. An act, ordinance, or regulation issued under the authority of this article does not require the approval by the Commission of any building permit in Montgomery County or Prince George's County, and any acts, ordinances, or regulations inconsistent herewith are repealed to the extent of the inconsistency. However, in Montgomery County, all building permit applications shall be referred to the Commission for review and recommendations as to zoning requirements. In Prince George's County, the County Council may provide by ordinance for the referral of some or all building permit applications to the Commission for review and recommendations as to zoning requirements.

(b) Zoning questions.- A district council may provide in its zoning regulations for the issuance of use and occupancy permits and for certificates by means of which zoning questions may be raised prior to the preparation of all

structural specifications of a building as may be required for a complete building permit.

MARYLAND RULES
(Michie 1997 Repl. Vol.)

Rule 8-113. Court papers - Duty of Clerk.

(a) Opinions.- All opinions of the Court shall be filed with the Clerk. The Court of Special Appeals shall designate for publication only those opinions that have substantial general interest as precedent. The Clerk shall deliver a certified copy of each opinion to be published to the State Reporter for inclusion in the State Reports.
(b) Record on appeal.-
(1) Request by Governor - Criminal cases.- When requested by the Governor, the Clerk may send to the Governor the record on appeal in a criminal case. The Clerk shall obtain a receipt.
(2) For preparation of record extract.- When necessary for preparation of a record extract and on request of a party, the Clerk may send all or part of the record on appeal to a commercial printer or photocopier for reproduction.
(3) Removal to State Archives.- The Clerk shall deliver the original records to the State Archives for permanent retention in accordance with the procedures established by the State Archivist and Records Management Division.
(c) Other court papers.- Except as otherwise provided in this Rule, the Clerk shall not release any original court paper without permission of the Court and the receipt of the party to whom it is delivered.

Rule 8-114. Unreported opinions.

(a) Not authority.- An unreported opinion of the Court of Appeals or Court of Special Appeals is neither precedent within the rule of stare decisis nor persuasive authority.
(b) Citation.- An unreported opinion of either Court may be cited in either Court for any purpose other than as precedent within the rule of stare decisis or as persuasive authority. In any other court, an unreported opinion of either Court may be cited only (1) when relevant under the doctrine of the law of the case, res judicata, or collateral estoppel, (2) in a criminal action or related proceeding involving the same defendant, or (3) in a disciplinary action involving the same respondent. A party who cites an unreported opinion shall attach a copy of it to the pleading, brief, or paper in which it is cited.

Rule 8-606. Mandate.

(a) To evidence order of the Court.- Any disposition of an appeal, including a voluntary dismissal, shall be evidenced by the mandate of the Court, which shall be certified by the Clerk under the seal of the Court and shall constitute the judgment of the Court.
(b) Issuance of mandate.- Upon a voluntary dismissal, the Clerk shall issue the mandate immediately. In all other cases, unless a motion for reconsideration has been filed or the Court orders otherwise, the Clerk shall issue the mandate upon the expiration of 30 days after the filing of the Court's opinion or entry of the Court's order.
(c) To contain statement of costs.- The mandate shall contain a statement of the order of the Court assessing costs and the amount of the costs taxable to each party.
(d) Transmission - Mandate and record.- Upon issuance of the mandate, the Clerk shall transmit it to the appropriate lower court. Unless the appellate court orders otherwise, the

original papers comprising the record shall be transmitted with the mandate.

(e) Effect of mandate.- Upon receipt of the mandate, the clerk of the lower court shall enter it promptly on the docket and the lower court shall proceed in accordance with its terms. Except as otherwise provided in Rule 8-611 (b), the assessment of costs in the mandate shall not be recorded and indexed as provided by Rule 2-601 (c).

FEDERAL JUDICIAL CENTER
NATIONAL CENTER FOR STATE COURTS

[SEAL] [SEAL]

STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS

A Report of the Committee on Use of
Appellate Court Energies of the
Advisory Council on Appellate Justice

FJC Research Series No. 73–2

State Courts Work-In-Progress Series
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August 1973

* * *

II. PRINCIPLES AND PROCEDURES FOR DETERMINING PUBLICATION

1. The Standards For Publication Should Be Promulgated By Rule Of The Highest Court To Govern Its Publication Practice And That Of Courts Under Its Supervision.

The language of this recommendation is general and may have to be modified in certain instances. For example, if a statute requires publication of all supreme court opinions, the supreme court, although itself bound by the legislation, nevertheless could promulgate a different rule for courts under its jurisdiction. We urge repeal of

any statutes mandating publication of all appellate opinions. The highest court should be given the power to adopt rules on this subject applicable to all courts. Generally, the standards set out here should apply throughout the court system.

The Committee considered the alternative of proposing that each court adopt rules governing its own operations. This method was rejected because it would probably introduce undesirable variations in publication practice within the system.

Each jurisdiction promulgating publication rules through a supervisory body not identical in composition to the high court should consider whether special treatment is required to avoid introducing problems with regard to the precedential value of non-published opinions. (See point IV below.)

* * *

III. STANDARDS FOR PUBLICATION

NO OPINION IN AN APPELLATE COURT SHOULD BE PUBLISHED UNLESS IT SATISFIES ONE OR MORE OF THE FOLLOWING STANDARDS.*

1. The Opinion Lays Down A New Rule Of Law, Or Alters Or Modifies An Existing Rule.

This language is preferred over "case of first impression" language since it offers less room for treating the application of established rules to novel fact situations as "first impression." The recommended language is sufficiently broad to encompass first-time construction of a new statute or a new construction of an old statute.

The Committee considered whether the publication standard should require that the new rule should be

"important" as well as "new." The recommended language reflects the Committee's view that the judiciary and the bar should be fully informed of the enunciation of new rules without regard to subjective judgments about their

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*When a lower court's opinion has been published in a case that has been taken up on appeal, the complete history of the progress of that case through the courts should be preserved in published records. This does not mean that an opinion would be published by the higher court. It should be published only if a standard for publication is satisfied. But, for example, when the higher court affirms or reverses merely by citing the opinion below, or by reference to a statute or controlling precedent, it is necessary to develop a method of listing and indexing judgments by case names in a table at the end of each volume of the official reports. A record is required to complete the history of the case and to permit complete Shepardizing.

Standards of Judicial Administration
Volume III

A.B.A. STANDARDS RELATING TO APPELLATE COURTS

Section 3.37 Publication of Opinions.

(a) Public Access. Opinions of an appellate court should be a matter of public record. Parties should be provided copies of a decision or opinion when it is filed, even if general dissemination is withheld until the opinion is in printed form.

(b) Formal Publication. An opinion of an appellate court should be published in the series of printed volumes in which the opinions of the court appear if, in the judgment of the judges participating in the decision, it is one that:

(i) Establishes a new rule of law, alters or modifies an existing rule, or applies an established rule to a novel fact situation;

(ii) Involves a legal issue of continuing public interest;

(iii) Criticizes existing law; or

(iv) Resolves an apparent conflict of authority.

(c) Citation of Opinions Not Formally Published. Rules of court should provide that an opinion which is not formally published may not be cited, but may be used to establish *res judicata*, collateral estoppel, law of the case, or other similar purposes.

(d) Supervision of Publication. The publication of an appellate court's opinions should be under supervision of the court.

(e) Printing of Decisions. The publication of an appellate court's opinions should be supervised by a member of the court's administrative staff. If the court publishes

a series of official reports, there should be a reporter of decisions serving on the court's staff and having responsibility, under supervision of the court, for developing suggested standards of format and citation style, for reviewing manuscripts of opinions, and for superintending publication of opinions.

Supreme Court, U.S.
FILED
FEB 20 1998
CLERK

No. 97-1041

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

MAENETTE B. SMITH, *et vir.*,

Petitioners,

v.

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO
THE COURT OF SPECIAL APPEALS OF MARYLAND

RESPONDENTS' BRIEF IN OPPOSITION

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32 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether certiorari is warranted where the decisions of the Maryland Court of Special Appeals were not inconsistent and did not deny Petitioners due process or equal protection under the United States Constitution?

2. Whether Petitioners have sufficiently demonstrated that the refusal by the Maryland state courts to apply the doctrines of *res judicata* and collateral estoppel warrants certiorari?

3. Whether certiorari is warranted where the Maryland state courts held that a denial of Petitioners' building permit application did not constitute an unconstitutional taking of property where Petitioners failed to avail themselves of the administrative remedies available to obtain the requested permit approval for almost four (4) years?

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STATEMENT OF THE CASE

The Petition for Writ of Certiorari is the culmination of an approximate ten (10) year dispute between Petitioners and Respondents The Maryland-National Capital Park and Planning Commission (hereinafter 'M-NCPPC") and Prince George's County, Maryland (hereinafter the "County"). Petitioners Jess Joseph Smith, Jr.[1] and his wife, Maenette B. Smith own a parcel of land, consisting of 2 lots, located at 14520 Church Street in Upper Marlboro, Maryland. This property, which was an undivided parcel until 1987, was located in a dual zoning category of R-80 (residential) and C-S-C (commercial).

In 1987, Petitioners subdivided their parcel into 2 adjacent lots designated as Lot 1 - Content and Lot 1 - Marlborough House (hereinafter "the Subject Property").[2] Petitioners designated Lot 1 - Content in the R-80 zoning category[3] and the Subject Property in the C-S-C zoning category. (*See* Appendix A, p. A-1 *infra.*)

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[1] Jess Joseph Smith, Jr. is also *pro se* counsel for Petitioners.

[2] Respondent M-NCPPC initially denied Petitioners' applications for subdivision of Lot 1 - Content and Lot 1 - Marlborough House (the Subject Property) due to Petitioners' failure to comply with the then applicable requirements of the Prince George's County Subdivision Regulations regarding the widening of an adjacent street and historic preservation. Petitioners appealed to the Circuit Court for Prince George's County, Maryland on or about July 1986 (hereinafter referred to as the "Subdivision Case"). (App. 116a.) The circuit court reversed and remanded the case to Respondent M-NCPPC, whereby the Petitioners' applications for subdivision were filed.

[3] Lot 1 - Content is not the subject of the instant Petition.

In subdividing their undivided parcel, Petitioners sought to divide the parcel along the zoning line which ran through the property.

After subdividing their parcel into two lots, Respondent M-NCPPC modified the base map within the zoning map for Petitioners' property to reflect the creation of both lots.[4] Respondent M-NCPPC is charged with the statutory responsibility for "planning, platting, and zoning functions" in Prince George's and Montgomery Counties, Maryland pursuant to Annotated Code of Maryland, Article 28, Section 7-111. (App. 146a-147a.) In accordance with its statutory charge, Respondent M-NCPPC maintains all zoning overlay maps and base maps in Prince George's County.[5] Although zoning overlay maps are prepared by Respondent M-NCPPC, said maps are prepared for the benefit and approval of the Prince George's County District Council (hereinafter "District Council"),[6] which is charged with the statutory authority to change or amend, *inter alia,* **zoning** boundary lines in accordance with Annotated Code of Maryland, Article 28, Section 8-104. (App. 153a-154a.) The District Council, however, does not approve modifications to base maps (e.g., changes to property boundary lines, subdivisions of property, etc.). (*Id.*)

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[4] A zoning map is comprised of a zoning overlay map and base map. (*See* Appendix B, p. A-3, *infra.*) A base map provides context to a zoning map by depicting geographical data such as property boundary lines, streets and roads (*See* Appendix C, p. A-4, *infra.*). A zoning overlay map only depicts land use zoning categories and zoning boundary lines within the County which have been approved by the Prince George's County District Council. (*See* Appendix D, p. A-5, *infra.*)

[5] For the purposes of Respondents' instant Brief, reference is made only to the maps maintained in Prince George's County.

[6] The Prince George's County Council sits as the District Council when acting on zoning matters.

In November 1989, Petitioners filed a building permit application with the Prince George's County Department of Environmental Resources (hereinafter "DER") to construct an office building on the Subject Property. In accordance with the Prince George's County Zoning Ordinance ("Zoning Ordinance"), the County referred Petitioners' permit application to Respondent M-NCPPC for a mandatory review of compliance with the Zoning Ordinance.[7] Upon review of Petitioners' subdivision plats for Lot 1 - Content (*see* Lodging No. 1) and Lot 1 - Marlborough House (*see* Lodging No. 2), it was evident that the Subject Property was split-zoned, with part zoned residential R-80 and the other part zoned commercial C-S-C.

The decision of the Board of Appeals in the related Administrative Appeal (discussed, p. 5 *infra*), which is binding on Petitioners[8] and on which they rely, established that the zoning line for the C-S-C portion of Petitioners' undivided parcel is measured **400 feet** from the center line of an adjacent street known as Water Street. (App. 134a, ¶ 13.) A review of Petitioners' subdivision plat for Lot 1 - Content (*see* Lodging No. 1) reveals that the subdivision line between Lot 1 - Content and Lot 1 - Marlborough House is **411 feet to the corner** of Water Street. Thus, the subdivision line for the Subject Property could not possibly align with the zoning line inas-

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[7]The Prince George's County Zoning Ordinance requires DER to refer all applications for grading, building or use and occupancy permits to Respondent M-NCPPC to review for compliance with the Zoning Ordinance or any conditions placed on the Subject Property prior to issuing a permit for same.

[8]The decision of the Board of Appeals is *res judicata* as to Petitioners inasmuch as they appeared before the Board, presented evidence, represented their interests and had the opportunity to (and did) appeal the Board's decision.

much as the subdivision line is actually greater than 411 feet from the *centerline* of Water Street since there is additional footage from the corner of Water Street to the centerline of same. (*Id.*) The misalignment of the subdivision and zoning lines on the Subject Property is further evidenced by the fact that the professional surveyor hired by Petitioners to survey the land acknowledged in a subsequent deposition that he did not know that the zoning line on the undivided parcel was measured from the center line of Water Street (discussed, *infra*). (*See also* Appendix G, p. A-10, *infra.*)

Respondent M-NCPPC informed Petitioners that it could not recommend approval of a building permit for the Subject Property since the Zoning Ordinance did not allow the use of the residential R-80 zoned section of the Subject Property with the commercial zoned section without the approval of a special exception. Respondent M-NCPPC requested that Petitioners correct the dual-zoning status of Lot 1 - Marlborough House, but Petitioners refused to take any remedial action. Accordingly, Respondent M-NCPPC had no other alternative than to recommend denial of Petitioners' building permit application to DER until said dual-zoning was corrected.

On January 24, 1990, DER issued a notice to Petitioners of the recommendation of denial by Respondent M-NCPPC, which also stated that Petitioners should contact Respondent M-NCPPC to correct any problems with their building permit application before a building permit could be issued. (App. 142a.) Prior to the issuance of the notice from DER, however, Petitioners filed a complaint for damages on or about December 28, 1989 against Respondents M-NCPPC and Prince George's County, and the Town of Upper Marlboro, Maryland. Said complaint was subsequently amended to include

the Prince George's County District Council as a defendant, and sought declaratory relief, an injunction, and damages pursuant to 42 U.S.C. §1983 for an alleged unconstitutional taking of Petitioners' property.[9] Petitioners alleged in their amended complaint, *inter alia*, that all of the Subject Property was in the C-S-C zone, and that Respondents "rezoned" the Property "without notice, hearing, or other procedural due process."

On February 14, 1990, Petitioners filed a parallel administrative appeal to the Prince George's County Board of Appeals (hereinafter the "Board of Appeals") challenging the County's denial of their building permit application. After several hearings, the Board of Appeals overruled the recommendation of denial by M-NCPPC. Thereafter, Petitioners and Respondents M-NCPPC and the County appealed the decision of the Board of Appeals to the circuit court (hereinafter referred to as the "Administrative Appeal"). The circuit court dismissed M-NCPPC as a party, holding that M-NCPPC did not have standing to appeal the decision of the Board of Appeals inasmuch as it was not aggrieved by said decision. Respondent M-NCPPC filed an interlocuturoy appeal of its dismissal to the Maryland Court of Special Appeals, the intermediate state appellate court. While pending, the Maryland Court of Appeals, the highest state court, *sua sponte*, granted *certiorari* and upheld the dismissal of Respondent M-NCPPC as a party to the Administrative Appeal in that M-NCPPC was not aggrieved by the decision of the Board of Appeals.

Since Petitioners filed a complaint for damages prior to the resolution of the Administrative Appeal, Respond-

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[9]The Town of Upper Marlboro, Maryland and the Prince George's District Council were subsequently dismissed as defendants.

ents M-NCPPC and the County filed motions to dismiss Petitioners' amended complaint for failure to exhaust administrative remedies. The circuit court granted Respondents' motions and dismissed Petitioners' amended complaint. Thereafter, Petitioners appealed said dismissal to the Court of Special Appeals, which reversed the dismissal and remanded the case with direction for the circuit court to retain jurisdiction of the case pending the outcome of the Administrative Appeal (hereinafter "First CSA Decision"). On remand, the circuit court issued a stay of Petitioners' complaint for damages pending the outcome of the Administrative Appeal.

In May 1990, in the interest of resolving the dispute, Respondent M-NCPPC proposed to survey Petitioners' property, at its own cost, to corroborate said dual-zoning status in order to obtain Petitioners' cooperation in correcting the dual-zoning. (*See* Appendix E, p. A-6, *infra.*) Petitioners acknowledged receipt of Respondent M-NCPPC's proposal, but declined same. (*See* Appendix F, p. A-8, *infra.*)

Petitioners had three administrative options to correct the dual-zoning status of the Subject Property. The first option was to file a Zoning Map Amendment which relates specifically to the Subject Property, and could have essentially been filed at any time. The second option was to file a Sectional Map Amemdment, which is a comprehensive rezoning process, that would have permitted the rezoning of the Subject Property and all land within a designated planning area in Prince George's County. (Petitioners ultimately pursued this option to have the Subject Property rezoned to all C-S-C, discussed p. 7 *infra.*) The final option was to file a zoning special exception to allow the use of the residential R-80 section of the Subject Property with the commercial C-S-C sec-

tion. Petitioners refused to pursue either option until June of 1993.

Prior to the conclusion of the Administrative Appeal, Petitioners, by letter dated June 16, 1993, requested that the dual-zoned section of the Subject Property in the 1994 Sectional Map Amendment which was then pending before the District Council. Respondent M-NCPPC agreed with Petitioners' request, and the Subject Property was rezoned from C-S-C and R-80 to all C-S-C by the District Council effective on May 24, 1994. It is noteworthy that the District Council's action to rezone the Subject Property confirmed that the Subject Property contained a split zoning classification that required correction.

Once the Subject Property was rezoned entirely to C-S-C, the County approved Petitioners' building permit application and issued the requested permits. Thereafter, Petitioners and Respondent Prince George's County withdrew their appeal of the Administrative Appeal since Petitioners had obtained the required rezoning of the dual-zoned portion of the Subject Property.

Following the dismissal of the Administrative Appeal, and after the parties completed discovery on Petitioners' complaint for damages, Petitioners filed a motion for summary judgment while Respondents filed cross-motions. On April 10, 1996, the circuit court denied Petitioners' motion and granted Respondents' cross-motions, holding that: (1) Respondent M-NCPPC had the authority to update base maps; (2) Respondent M-NCPPC did not cause the Subject Property to be dual-zoned; (3) there was no governmental taking of the Subject Property by the County; (4) *res judicata* was not applicable as to the zoning classification of the Subject Property and (5) Petitioners were responsible for the delay in the issuance

of their permit by failing to pursue any of the administrative options within a reasonable time. (App. 15a-22a.)

Petitioners appealed to the Court of Special Appeals, which affirmed the circuit court's decision (hereinafter "Second CSA Decision"). Petitioners then filed a request for a Writ of Certiorari to the Maryland Court of Appeals, which was denied on August 22, 1997.

REASONS FOR DENYING THE PETITION

I.

THE DECISIONS OF THE MARYLAND COURT OF SPECIAL APPEALS WERE NOT INCONSISTENT.

After Petitioners filed their amended complaint for damages in 1989, Respondents filed motions to dismiss for Petitioners' failure to exhaust their administrative remedies. Petitioners responded by filing a motion for summary judgment. In the First CSA Decision, filed April 28, 1992, the Court of Special Appeals was asked to determine if the circuit court should have dismissed the Petitioners' case for failure to exhaust administrative remedies and whether the Petitioners' motion for summary judgment should have been granted. (App. 1a-12a.) The Court of Special Appeals held that where a claim for damages is alleged pursuant to 42 U.S.C. §1983, the circuit court should not dismiss a petitioner's case for failure to exhaust administrative remedies, but should retain jurisdiction over the case until such time that the administrative remedies have been exhausted. That Court also stated that summary judgment was not appropriate since, at that time, there was a question of material fact as to whether a "rezoning" of Petitioners' property had occurred. (App. 11a-12a.) At the time of the First CSA Decision, the parties had not conducted discovery.

Following the remand of the First CSA Decision and after discovery had been completed, Petitioners filed a second motion for summary judgment alleging that there were no material facts in dispute and that they were entitled to judgment as a matter of law.[10] Respondents M-NCPPC and Prince George's County along with the District Council, filed cross-motions for summary judgment. The circuit court granted Respondents' and the District Council's cross-motions but denied the Petitioners' motion, holding: (1) that Respondent M-NCPPC was authorized to make changes to the base maps to reflect the subdivision of the Subject Property; (2) that Respondent M-NCPPC did not cause the Subject Property to be dual-zoned; (3) that there was no governmental taking by the County since Petitioners refused to take remedial action to correct the dual zoning status of the Subject Property; and (4) that *res judicata* was not applicable to the case inasmuch as (i) Respondent M-NCPPC did not have standing to appeal the decision in the Administrative Appeal and (ii) the zoning classification of the Subject Property was not previously subject to litigation. (App. 15a-23a.)

Since Petitioners and Respondents conducted discovery prior to filing motions and cross-motions for summary judgment, unlike when the First CSA Decision was rendered, the circuit court had ample facts before it to make a determination that there was no genuine dispute of any material facts. The Court of Special Appeals

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[10] Notwithstanding Petitioners' assertion that both decisions of the Court of Specials were inconsistent, it should be noted that, after the First CSA Decision, Petitioners first filed a motion for summary judgment following the completion of discovery. One can only wonder whether Petitioners would assert their claim of inconsistency if their motion for summary judgment had prevailed. As discussed above, however, said decisions were not inconsistent.

reviewed the decision on the facts and evidence, and found no error in the decision. Moreover, after reviewing the First and Second CSA Decisions, it is not inconsistent for both decisions to reach different conclusions in light of the different questions raised on appeal. (*See* App. 2a and 24a-25a.)

II.

THE MARYLAND COURTS CORRECTLY DECLINED TO APPLY THE DOCTRINES OF *RES JUDICATA* AND COLLATERAL ESTOPPEL.

Petitioners also erroneously assert that the decision of the Board of Appeals in the Administrative Appeal is *res judicata* as to Respondents and is the "law of this case with respect to all parties and issues and is controlling on them . . . ," and that the Maryland Courts did not correctly apply the doctrine. Petitioners further argue that Respondents are collaterally estopped by the ruling in the 1986 Subdivision Case.[11]

Since Respondent M-NCPPC's appeal of the Administrative Appeal was dismissed, and Respondent M-NCPPC was precluded from appealing same for lack of standing (*see* App. 110a-111a), said decision is not binding on Respondent M-NCPPC. Further, Petitioners

---

[11] Petitioners would have this Honorable Court believe that the 1986 Subdivision Case is relevant to the instant case. It is not. A review of the circuit court's ruling in that case (App. 116a) shows that the holding has absolutely no applicability to the instant litigation. The order of the circuit court only reversed Respondent M-NCPPC's denial of Petitioners' applications for subdivision plats for the Subject Property (*see e.g.*, Appendix A, p. A-1, *infra*, and App. 116a). At no time did said order address the zoning status of Petitioners' property, which Petitioners self-designated. (*Id.*) Accordingly, the doctrines of *res judicata* and collateral estoppel are not applicable to the instant case. *See also* footnote 2, *supra*.

erroneously assert that Respondents "are in privity as to all issues decided in both the subdivision case and the administrative appeal case." (Petitioner's Petition, p. 25.) This Court has held, however, that to establish "privity," it must be shown that ". . . in certain limited circumstances, a person, although not a party, has his interests adequately represented by someone with the same interests who is a party." *Richard v. Jefferson County, Alabama,* 517 U.S. ___ , 116 S.Ct. 1761, 1766, 135 L.Ed.2d 76, 84 (1996). Respondents M-NCPPC and Prince George's County remained parties in the instant action and related cases, except when M-NCPPC was dismissed as a party to the Administrative Appeal, and represented their separate interests.[12] Petitioners have failed to establish privity between Respondents and would have Respondents penalized for exercising judicial economy in the filing of its pleadings.

Respondent M-NCPPC is a state created bi-county agency, serving Montgomery and Prince George's Counties, established by the Maryland legislature pursuant to Annotated Code of Maryland, Article 28. Respondent Prince George's County is a Maryland chartered county which was also established by the Maryland legislature, albeit for different purposes. Both Respondents are separate and distinct entities which happened to have similar positions in the instant litigation due to Petitioners' allegations. As such, the administrative decision of the Board of Appeals is not *res judicata* as to Respondents M-NCPPC or Prince George's County.

---

[12]When Respondent M-NCPPC was dismissed as a party from the Administrative Appeal, Petitioners are correct in stating that counsel for M-NCPPC *individually* entered his appearance on behalf of Respondent Prince George's County. At no time, however, did Respondent M-NCPPC represent Respondent Prince George's County, or *vice versa.*

It is a well-established principle that *res judicata* does not apply with respect to an administrative decision if "the party against whom it is sought to be asserted could not have appealed from the decision that allegedly embodied the fact-finding in question." *Murray International Freight Corporation v. Graham,* 315 Md. 543, 545, 555 A.2d 502, 503 (1989) (emphasis added); *See also Warner v. German,* 100 Md. App. 512, 642 A.2d 239 (1994) (requirement that collateral estoppel cannot bind a second party by a previous decision unless that party had an appropriate opportunity to appeal the first decision).

III.

THE RECOMMENDATION OF DENIAL OF PETITIONERS' BUILDING PERMIT APPLICATION DID NOT CONSTITUTE AN UNCONSTITUTIONAL TAKING OF PROPERTY.

Petitioners' assertion that the Subject Property was subject to an unconstitutional taking is less than specious. As noted by the circuit court, Petitioners were the cause of the delay in the issuance of a building permit for the Subject Property by failing to pursue one of the three administrative options available to them: (1) to request a zoning special exception to utilize the residential R-80 zoned section of the Subject Property for commercial purposes with the C-S-C zoned section; (2) request a Zoning Map Amendment to have said R-80 section re-zoned to C-S-C or (3) request a Sectional Map Amendment to have said R-80 section re-zoned to C-S-C. In the

instant case, Petitioners' waited approximately four (4) years before seeking and obtaining a Sectional Map Amendment for the Subject Property.[13]

In May 1990, Petitioners further spurned an expeditious resolution of the purported dispute by declining Respondent M-NCPPC's offer to have the Subject Property surveyed, at M-NCPPC's cost, to confirm that the Subject Property was located in split-zoning categories. (*See* Appendices E & F, pp. A-6, A-8, *infra.*) Respondent M-NCPPC offered to recommend approval of Petitioners' permit application if the Subject Property was not split-zoned, but requested that Petitioners pursue one of the three (3) administrative options if same was split-zoned. Petitioners declined the offer of Respondent M-NCPPC. As such, the trial court correctly noted the following of Petitioners: "to equate self-imposed delay with deprivation at the hands of the government is wholly disingenuous." (App. 21a.)

Finally, the crux of the case is that Petitioners' surveyor failed to correctly subdivide the Subject Property. In a sworn deposition, Petitioners' surveyor stated that he did not know that the zoning line on the Subject Property was measured from an adjacent street (*See* Appendix G, p. A-10, *infra.*)

---

[13] Although the Section Map Amendment process, under which Petitioners ultimately had the Subject Property rezoned, became available in 1993, Petitioners could have filed a Zoning Map Amendment or special exception at anytime. (*See* discussion, pp. 6, 12, *supra.*)

CONCLUSION

In the instant case, there are no important questions of federal law for this Honorable Court to settle. Petitioners essentially assert nothing more than an alleged misapplication of a properly stated rule of law. In reviewing Petitioners' petition for certiorari to the Maryland Court of Appeals, the state court of last resort, said court denied the petition, noting that "there has been no showing that review by certiorari is desirable and in the public interest." (App. 62a.) Then, as now, Petitioners have failed to show an appropriate basis for the grant of certiorari.

Petitioners simply failed to align the subdivision line between Lot 1 - Content and Lot 1 - Marlborough House with the zoning line on the property, and were the sole cause of any delay in the corrective rezoning of the Subject Property. As such, there is no genuine dispute as to any material fact with regard to the instant case, and the trial court properly granted Respondents' cross-motions for summary judgment.

Wherefore, Respondents M-NCPPC and Prince George's County respectfully request that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

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PRINCE GEORGE'S COUNTY, MARYLAND

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Associate County Attorney
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Room 5121
Upper Marlboro, Maryland 20772
(301) 952-4124

APPENDIX A

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION DEVELOPMENT DIVISION

APPLICATION FOR APPROVAL OF PRELIMINARY SUBDIVISION PLAT

(Submit one application form to the Prince George's County Subdivision Office)

The undersigned hereby applies for approval by the Prince George's County Planning Board of the accompanying preliminary subdivision plat and certifies the information supplied herewith to be correct.

Named of Proposed Subdivision "Marlborough House"

Lot & Block Nos. Lot 1

Location

Upper Marlboro Prince George's 3rd
(Town or Locality) (County) (Election Dist.) (Special Tax Area)

Proposed Use of Property Commerical

Geographical Location Upper Marlboro, Maryland

Zoning CSC

Existing Proposed

No. of Lots Proposed 1 Fee $262.00

Proposed Sanitary Facilities SA-1 SA-1
Water (Sewage Disposal)

Owner Jess J. Smith, Jr. et. ux (Office) 627-8200
(Name) (Telephone Number)

14718 Main Street, Upper Marlboro, Maryland 20772-0519
(Address)

Title Citation (last recorded conveyance):

Grantor Mattie P. Bowling, et. al.
Grantee Jess J. Smith, Jr. et. ux
Area of Tract as Conveyed 1.1580 Acres
Date of Conveyance April 2, 1977
Land Records Reference L-4745/F-805
Area Included on plat 0.5522 Acre

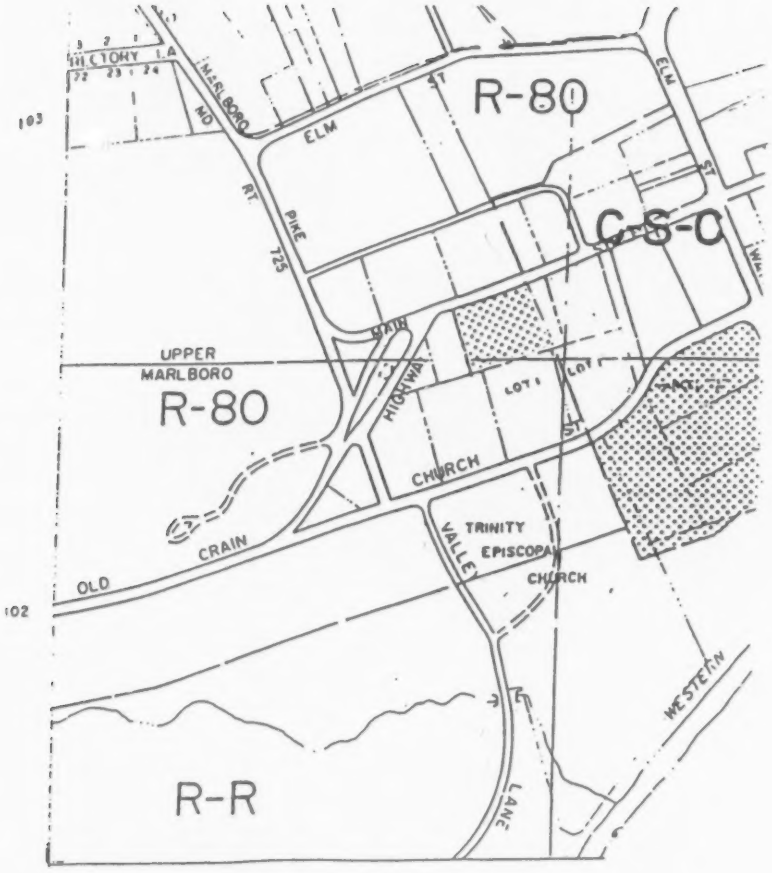
Existing Legal Encumbrances:

Rights of Way L-1827/F-468
Easements None
Other None
Existing Covenants None
Engineer/Surveyor
Name Baldwin & Sampson, Inc.
Address 7900 Old Branch Avenue, Suite 205, Clinton, Maryland 20735
Telephone No. 856-1800

Note any further proposals or unusual conditions affecting the property using the reverse side of this page.

SIGNATURE OF OWNER: /s/ Jess J. Smith, Jr.

APPENDIX B



207 SE 13

BASE MAP LATEST UPDATE 8-22-88

ZONE MAP LATEST UPDATE 5-1-89

SMA ADOPTION DATE PA 79 7-12-77
PA 82A 7-12-77

207 SE 13L

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Park /

A-7

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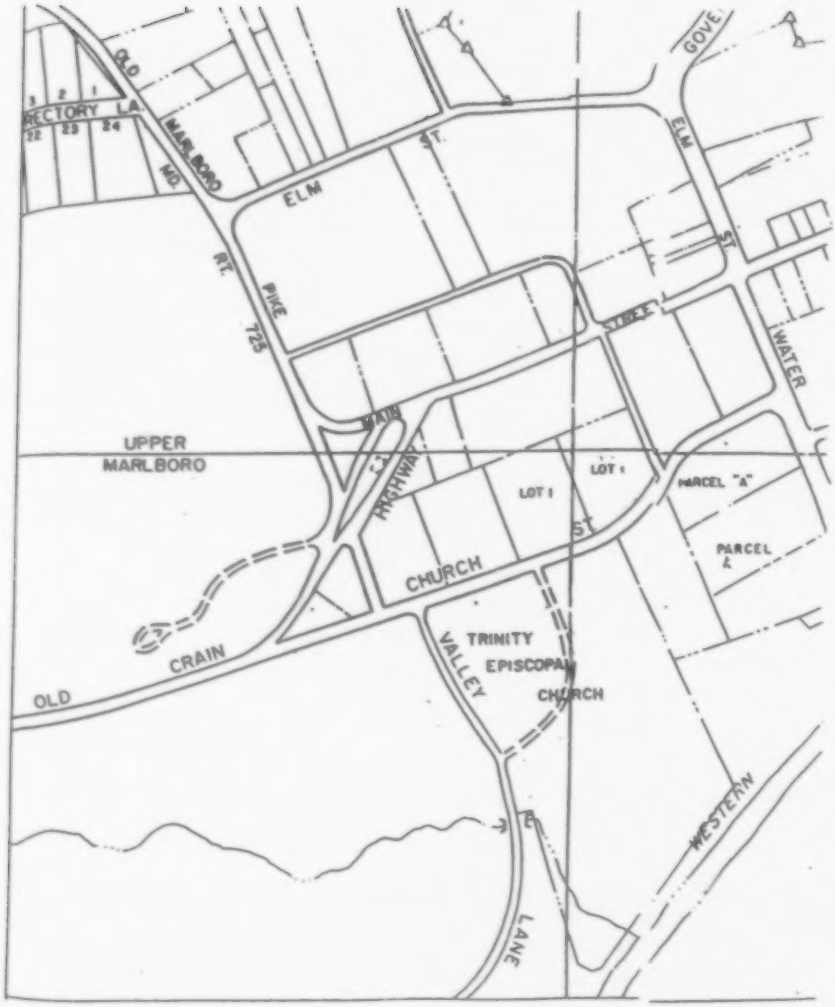
APPENDIX C



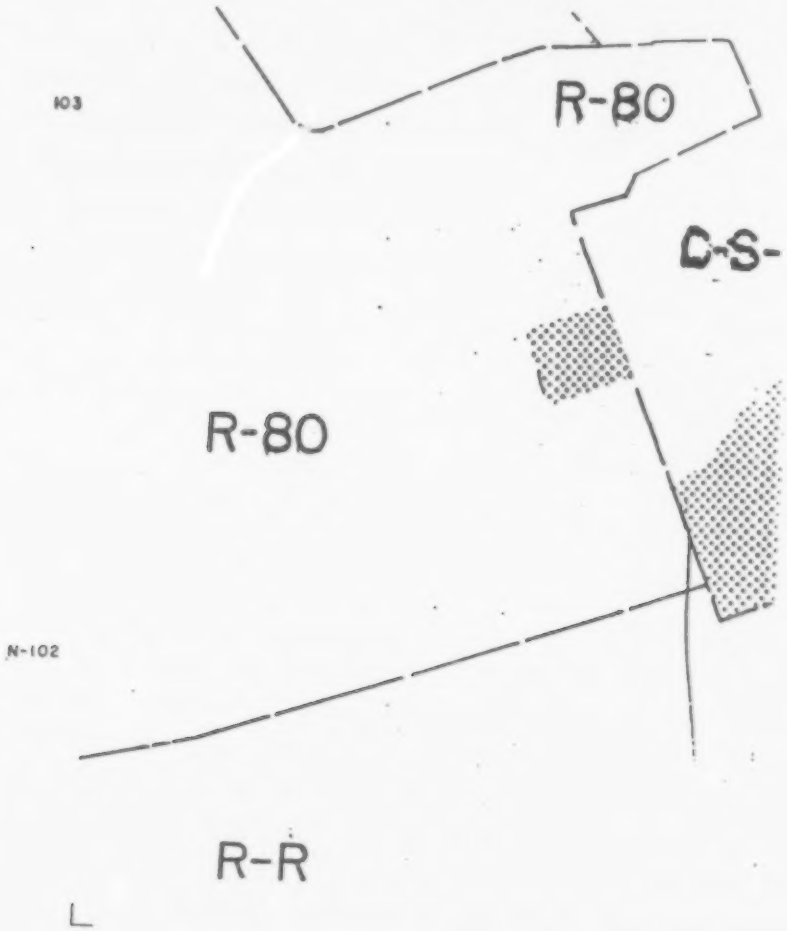
207 SE 13

BASE MAP LATEST UPDATE _____

Court 924

The Mary

APPENDIX D



ZONE MAP LATEST UPDATE 5-1-89

SMA ADOPTION DATE PA 79 7-12-77
PA 82A 5-12-77
207 SE 13L

J-2

APPENDIX E

THE MARYLAND-NATIONAL CAPITAL PARK
AND PLANNING COMMISSION

6600 Kenilworth Avenue
Riverdale, Maryland 20737-0707

LEGAL DEPARTMENT
(301) 699-2577

May 1, 1990

Jess Joseph Smith, Esquire
P.O. Box 698
Upper Marlboro, MD 20772

RE: *Smith et al. v. M-NCPPC,* CAE 89-24602

Dear Mr. Smith:

This letter will put to writing our conversation of the letterhead date, in which I proposed to you that the Commission was willing to have your property surveyed by an independent surveyor, at its cost, in order to verify whether your property is located in a split-zoning classification. It was anticipated that an independent survey would resolve this matter once and for all. Notwithstanding this proposal, however, you stated that you would not agree to the survey, and that you would prefer to have the court make a determination on the matter.

On a different note, this office has learned that you have contacted the Honorable Kirk Wineland, a member of the Prince George's County District Council (which you have named as a co-defendant in this action), regarding the merits of this case. As you are aware, the District Council is represented in this action by Ms. Joyce A. Birkel. Furthermore, as an attorney practicing in this

county, you should also be aware that such contact without the consent or knowledge of counsel is prohibited. Thus, it is requested that you make no further contact with any of the defendants in this action, absent the consent of respective counsel. Failure to comply with this request will result in a motion to the court for an injunction and sanctions.

Should you have any questions regarding these matters, you may contact me at the above-listed number.

Sincerely,

/s/ Isaac H. Marks
Isaac H. Marks
Associate General Counsel

enc.
cc: Elizabeth M. Hewlett, Esq.
Joyce A. Birkel, Esq.
Albert J. Lochte, Esq.

APPENDIX F

LAW OFFICES OF

JESS JOSEPH SMITH, JR.

P.O. BOX 698
UPPER MARLBORO, MD. 20772
(301) 627-8200 FAX 627-4506

May 4, 1990

HAND DELIVERED THIS DATE

Isaac H. Marks, Esq.
Associate General Counsel
M-NCPPC
Room 4134, CAB
Upper Marlboro, MD 20772

Re: Smith, et vir. v. MNCPPC, et al.
CAE 89-24602

Dear Mr. Marks:

With respect to your letter dated May 1, 1990, mailed May 3, 1990, and received on May 4, 1990, I am attaching a copy of my letter dated and delivered to Councilman Wineland of April 30, 1990, that indicates that I was totally unaware that Councilman Wineland was negotiating any settlement with MNCPPC on my behalf.

Needless to say, I was shocked to find out that my "general grousing" to him while, as I characterized it in the noted letter to him, resulted in him taking some action.

For your information, I did not seek out Mr. Wineland, but saw him in the hallway of the Courthouse sometime during the week of March 12, 1990, during a break when we both had petit jury duty and, at that time, com-

plained to him generally about the poor judgment of MNCPPC in taking the position that they are taking with respect to the development of the property that is the subject of the noted lawsuit.

If you have any questions in this regard, please do not hesitate to contact me.

Respectfully,

/s/ Jess Joseph Smith, Jr.
Jess Joseph Smith, Jr.

JJS:pmc

HAND DELIVERED COPY TO:
Elizabeth M. Hewlett, Esq.
Joyce A. Birkel, Esq.
Albert J. Lochte, Esq.

Enclosure: as indicated

APPENDIX G

IN THE CIRCUIT COURT FOR
PRINCE GEORGE'S COUNTY, MARYLAND

CASE NO. CAE 89-24602

MAENETTE B. SMITH, *et vir.*,

Plaintiffs,

vs.

MARYLAND NATIONAL CAPITAL
PARK & PLANNING COMMISSION, *et al.*,

Defendants.

Wednesday, July 19, 1995

Deposition of

ROSCOE TIPPETT,

a witness, called for examination by counsel for the Defendants, pursuant to Notice, at the offices of The Maryland National Capital Park and Planning Commission, County Administration Building, Upper Marlboro, Maryland 20772, commencing at 10:51 a.m., there being present on behalf of the respective parties:

* * *

[4] been practicing surveying since the age of 16.

Q. And where are you licensed as a surveyor?

A. I'm licensed in Maryland and Virginia.

Q. Are you familiar with the – strike that.

Let me back up to say that – have you had your deposition taken before?

A. Yes, sir, I have.

Q. If I ask any questions that you're unfamiliar with, please stop me and let me know that you're unclear on what I'm asking, and I'll be glad to rephrase it.

A. Yes, sir.

Q. Are you familiar with Jess Joseph Smith?

A. Yes, sir, I am.

Q. And did you have occasion to work with him, or to survey some property owned by him in Upper Marlboro, approximately 1985?

A. Yes, sir.

Q. And how did that come about; that you were brought in to survey that property?

A. Mr. Smith had purchased – as memory serves me, Mr. Smith had purchased the house and property. And he * * *

* * *

[12] there's a distance written on here. As you can see, it's – these plats are on a 1-inch equals 200 scale. So we pop a scale out, and we get 140 feet there, and we get approximately 140 in the back.

Q. And what do you measure from?

A. I measured from this lot line that they show on the zoning plat as being the division line between Mr. Smith's property and – I can tell you the owner's next door was Gore; an H.R. Gore annex at that time. And I determined that, and measured over to set this line.

Q. Okay. Are you aware that the zoning line measures from the center line of Water Street?

A. No, I'm not. There's nothing on this plat that indicates a setback. On zoning plats, since this case that I've testified in before, the new zoning plats that I see come out, they do give me definite lines. From Water Street – well, not from Water Street, but from roads

back. I have noticed that. On this plat, there's nothing delineated to say that.

Q. Did you obtain this plat, or did Mr. Smith bring you Tippett Exhibit No. 1; if you recall.

* * *

REFERENCE TO LODGINGS

The following items were submitted to the U.S. Supreme Court Clerk's Office as Lodgings as part of this Respondent's Brief In Opposition:

- Lodging No. 1 – Subdivision Plat Map for Lot 1 - Content.
- Lodging No. 2 – Subdivision Plat Map for Lot 2 - Marlborough House

Supreme Court, U.S.
FILED
MAR 10 1998
CLERK

No. 97-1041

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

MAENETTE B. SMITH, *et vir.*,

Petitioners,

v.

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO
THE COURT OF SPECIAL APPEALS OF MARYLAND

REPLY BRIEF OF PETITIONERS

JESS JOSEPH SMITH
(Counsel of Record)
P.O. Box 1995
14518 Church Street
Upper Marlboro, MD 20772
(301) 627-8200
Attorney for Petitioners.

Washington, D.C. • THIEL PRESS • (202) 328-3286

REPLY BRIEF of PETITIONERS

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REPLY BRIEF of PETITIONERS

I. *RES JUDICATA*, PRIVITY and INCONSISTENT OPINIONS: Respondents argue that the **subdivision case** is not *res judicata* stating that at no time did the order of court in the subdivision case address the zoning status of Petitioners property. True, the order itself did not address the status of the zoning of the property because everyone including the Judge, MNCPPC, and the Smiths, understood and agreed that the zoning of the property was all in the CSC zone. The court order did, however, expressly approve the subdivision plat of the subject property having the understood and agreed CSC zoning category clearly marked on it[1]. Further, the issue of zoning is an issue in a subdivision case as clearly testified to by the MNCPPC employee in the **administrative appeal case**. Other reasons why zoning is an issue in the subdivision case are cataloged at page 26 of the Petition for Writ of Certiorari. Even assuming, *arguendo*, that the zoning was not raised, it clearly could have been raised. *Res judicata* clearly applies to all of the issues that were raised or could have been raised, *Warner v. German*, 100 Md.App. 512, 518, 642 A.2d 239 (1994), "[A] judgment between the same parties and their privies is a final bar to any other suit upon the same cause of action, and is conclusive, not only as to all matters that have been decided in the original suit, but as to all matters which with propriety could have been litigated in the first suit."

Respondents argue with respect to the administrative appeal case that no privity has been established between the MNCPPC and the County, that they are separate legal entities, and that finding privity because of the joint representation or joint briefs would penalize Respondents

---

[1] Petitioners' Appendix N and O, App. 124a-127a, item no. 3 at 127a.

"...for exercising judicial economy in the filing of its pleadings." The *res judicata* privity argument clearly does not 'penalize' the Respondents but merely recognizes the reality of the relationship and the common, and, in fact, identical[2], interests of both the MNCPPC and Prince George's County as parties in the administrative appeal case. *Warner, supra.* A brief review of the record of the proceedings before the Board of Appeals clearly shows that both the County and MNCPPC were represented by counsel (same attorneys who are 'of counsel' on Respondents' Brief in Opposition), and that the attorney for the MNCPPC controlled the proceedings, Petitioners' Appendix Z, App. 177a-186a. Further, once MNCPPC had been dismissed as a party, Mr. Marks, although an employee of the MNCPPC, continued to control the litigation by representing the County[3].

Respondents further argue that since they had no right to appeal the administrative appeal case, that it is not *res judicata* as to them. It is respectfully submitted that where there is privity, there need be no right to appeal to have the administrative case considered *res judicata*, *Warner, supra.*

---

[2] Nowhere in any of these proceedings has there been a divergent interest expressed between MNCPPC and Prince George's County because there is no different interest; they were both represented by the same attorney (the staff attorney for the MNCPPC) in the administrative appeal case.

[3] Respondents argue in their footnote 12 that the representation was *individually* and that the MNCPPC was not representing the County. It is submitted that the Maryland Lawyers' Rules of Professional Conduct, Respondents' Appendix BE, App. 188a, prohibit an attorney from representing a client whose interests are materially different than a former client. The interests of the MNCPPC and the County were clearly the same; otherwise, the attorney for the MNCPPC would have been prohibited for subsequently representing the County. Counsel for the Respondents was a staff attorney for the MNCPPC and it could be argued that he was an agent or employee of the MNCPPC when he represented the County.

Further, Maryland law provides that trial courts and appellate courts are bound by the fact finding of administrative bodies if there is substantial evidence, as here, to support the findings, *Maryland State Dept. of Education v. Shoop*, 119 Md.App. 181, 704 A.2d 499 (1998).

The Respondents make a frivolous argument in their footnote 8 that the Petitioners are the only parties bound by the Board of Appeals decision and suggest that they are not bound by the decision since they did not have a right to appeal it even though they actively participated in and controlled the presentation of evidence at the Board of Appeals. Accordingly, they are bound by the decision.

Neither the trial court nor the 2nd CSA addressed the issue of privity as it relates to *res judicata* and, thus, clearly did not properly state or apply the Maryland law as it relates to *res judicata*.

Respondents further argue that the decisions of the 1st CSA and the 2nd CSA are not inconsistent because different questions were raised on appeal. On the contrary, both panels of the same court had before them the same issues raised by Petitioners' Motions for Summary Judgment that included the issues of *res judicata* as to the subdivision case, the decision in the administrative appeal case[4], estoppel, detrimental reliance, as well as MNCPPC changing the zoning map without notice or hearing and then relying on the changed zoning map to deny a building permit. In addition, both panels of the same court had the 42 U.S.C. 1983 claim before them but, nevertheless, rendered inconsistent opinions. Respondents further argue that it is not inconsistent for the same court to reach different conclusions because of the different questions raised. The major inconsistencies, of course, are the remand by the 1st CSA for a factual

---

[4] The administrative appeal case had not been final when the 1st CSA made its decision and the 1st CSA stayed this case pending the outcome of the administrative appeal case.

determination by a jury on whether or not MNCPPC had changed the zoning map of the subject property and the trial court and the 2nd CSA totally ignoring that issue, but deciding the jury issue of fact by an assumption of facts, as well as failing to address the 42 U.S.C. 1983 claim addressed by the 1st CSA, among other inconsistencies previously discussed in the Petition.

II. BOARD of APPEALS DECISION[5]: The Prince George's Board of Appeals is that statutory administrative body charged with the responsibility of reviewing decisions relating to building permits[6].

The Board of Appeals heard all the issues relating to the building permit and decided the case favorable to the Petitioners. Both the MNCPPC and Prince George's County presented evidence and cross-examined witnesses. Both sides appealed and the appeals were later dismissed thereby making the Board of Appeals decision ***final***[7]. All issues of fact here argued by the Respondents were extensively developed and gone into before the Board of Appeals and all parties herein were represented by same counsel before that body and, in fact, the same counsel presently before the Supreme Court

---

[5] The Board of Appeals decision is found at Petitioners' Appendix P. App. 128a-134a. The Board made findings of fact based on the evidence presented before it as outlined in its order after five (5) lengthy hearings lasting approximately 2 months, decided favorably to the Petitioners in a thorough and complete opinion. Essentially, the Board had before it all of the evidence relating to this case including both the Petitioners and Respondents lodgings, and all other documents referred to in the Petition for Writ of Certiorari and Reply Brief.

[6] Annotated Code of Maryland, Art. 28, § 8-107 and Prince George's County Code, § 27-229, Petitioners' Appendices BB and CC, App. 191a and 190a.

[7] The time period for appeal of the Board's decision having expired and the decision of the Board of Appeals cannot be contested again. All parties thereto, the Petitioners, MNCPPC and Prince George's County are bound by that decision, it is respectfully submitted.

and in this case were the identical counsel who were before the Board of Appeals.

It is unnecessary for this court to get into a review of the facts of this case because the decision on the facts has already been made by the Board of Appeals.

III. SMOKE SCREEN FACTS: At the outset, it is respectfully pointed out that this court need not address any issues of fact since those issues have been previously determined after lengthy hearings and a thorough and complete findings of facts and conclusions, Petitioners' Appendix P, App. 128a-134a. It is also noted that the Respondents do not dispute any facts contained in the Petitioners' Statement of the Case.

The Respondents have made innumerable references to facts that are not supported by the evidence in the case, are not correct, are incomplete, inaccurate or misleading. It is significant to note, however, that in the first sentence of the first full paragraph on page 2 of Respondents' Brief, the MNCPPC and Prince George's County, for the first time in these proceedings, now ***admit*** that they changed the zoning map of the subject property. In the same paragraph, it is unclear as to just what "zoning function" MNCPPC is claiming. It is clear from the statute, namely Art. 28, §§ 8-101, 104, 106 of the Maryland Code, Petitioners' Appendix W, App. 171a, that, with respect to the issues in this case, the MNCPPC does not have any zoning power to change the zoning maps; however, it is conceded that they do have the power to maintain and update the base maps from time to time from which a zoning map is made. It is pointed out, however, that when there is ***ANY CHANGE*** to a zoning map (like putting a changed base map with a zoning overlay thereby making a 'new zoning map') then the 'new' or 'changed zoning map' must be approved by the District

Council, and then only after notice and a hearing, as provided in the previously noted statute.

At page 3 and 13 of their Brief, Respondents' statement that they relied on their Lodging No. 1 and No. 2 to recommend denial of Petitioners' building permit application is contrary to the testimony of their own employee, Ruth Senes, who testified[8] that it was the changed zoning maps that were relied on to recommend denial of the building permit application in question. Respondents argument is also contrary to the findings of the Board of Appeals.

Like Mr. Tippett who was not aware of any distance of the zoning line from Water Street, the representative of the MNCPPC first seen when the property was being developed in 1985, and the proper governmental official, measured off the zoning line distance as 140' from the rear boundary of the Petitioners' property, and not the distance from Water Street[9]. That figure was then (in 1985) written on the '77

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[8] Petitioners' Appendix Z, mid-page App. 179a. At the bottom of page 4, Respondents claim the initial lawsuit was for damages when, in fact, it was a declaratory judgment, Petitioners' Appendix X, App. 173a.

[9] At pages 3 and 4 of the Opposition Brief, counsel argue that zoning line is measured 400 feet from the centerline of Water Street. The Prince George's County Code § 27-111, Petitioners' Appendix AA, App. 187a, provides that once subdivided and a property line established, the zoning line then follows the property line. Further, the County Code is liberal is permitting ten (10) feet variation (actually eleven [11] when you consider the one [1] foot variation granted when scaling to a zoning line with no dimensions shown on the zoning map, as here). Further, Mr. Tippett pointed out that the zoning maps did not have dimensions to zone boundaries on the maps. Respondents Appendix G, App. A-12. A close look at Respondents' Appendices B and C, App. A-3 and A-4, clearly shows the problem of MNCPPC changing maps at their whim as in the instant case. For example, at App. A-3, look at the alley to the east (right) of Lot 1 (the right lot 1) and compare it to the direction of Water Street. Then on A-4 look at the same alley and compare it to the direction of Water Street. There are

zoning map, Appendix S, App. 140a, same as hard copy, Petitioners' Lodging No. 1.

It is respectfully pointed out that both of the Respondents, MNCPPC and Prince George's County, were represented by Isaac Marks and by Maurene Epps, both same as 'of counsel' for the Respondents in their Brief in Opposition filed herein. Both the MNCPPC and Prince George's County were parties to the Board of Appeals proceedings and participated therein, Petitioners' Appendix Z, App. 177a, 178a.

Assume *arguendo* that the surveyor made a mistake. As to the '1983' claim, due process and equal protection, it makes no difference whether or not the surveyor made a mistake since the zoning map was secretly changed as now admitted by the Respondents and the changed zoning map was then used to deny building permit contrary to statute.

IV. SMITHS are UNCOOPERATIVE: Suggest a survey when none is needed[10] and then argue that the Petitioners are uncooperative because they won't agree to a survey. Change the zoning map without notice or a hearing

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vast differences in the direction of the alley relative to Water Street. This argument of the Opposition adds nothing but confuses the real issues. Looking at the curve in Church Street at App. A-3 and A-4, you will see that the 411+/- feet distance greatly exceeds the straight line distance from the property line to Water Street, that is, the ***direct*** line distance would be substantially less than 411+/- feet and still within the permitted eleven (11) foot variation. Respondents same 400 foot argument was made before the Board of Appeals and rejected by that body as clearly shown in its findings that the zoning line had not been changed. This is also clearly shown by Petitioners' Lodging No. 1 showing the '77 and '88 zoning maps superimposed. If the transparency of Petitioners' Lodging No. 1 is separated from the hard copy and then replaced, the viewer can easily see what the MNCPPC did to the property lines when they changed the zoning map in 1988.

[10] See Petitioners' Lodging No. 2, Deed of Agreement to Establish Boundary Line.

and then argue that the Petitioners had three options to correct the problem and argue that they are uncooperative and caused the dual zoning of their property. These arguments are so transparent that they do not merit serious consideration by the court in view of the fact that the County's own Board of Appeals considered all of these arguments raised here by the Respondents and decided all matters favorable to the Petitioners.

Further, the MNCPPC's own witness, Senes, testified before the Board of Appeals[11] that the Smiths met with the MNCPPC to try to resolve issues. Further, Senes testified that the unapproved and unadopted '88 zoning map[12] was used to deny the building permit[13], contrary to the representations of Counsel with respect to Respondents' Lodgings Nos. 1 and 2.

Respondents' Counsels' statements outlining the findings of the trial court and the 2nd CSA appear to be overreaching. This Court can see just what the trial court and the 2nd CSA held since those opinions are part of the record herein in Appendix C, App. 15a, and Appendix D, App. 24a.

Petitioners have never contested the authority of the MNCPPC to update base maps; however, when they put a zoning overlay over an updated base map thereby creating an new zoning map, then a notice and hearing before the District Council is required by statute, Petitioners' Appendix W, App. 172a.

Further, the Board of Appeals found that the MNCPPC had changed the boundaries of the Petitioners' property as clearly shown in Petitioners' Lodging No. 1. The

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[11] Petitioners' Appendix Z, App. 178a, at [84].

[12] There was also testimony that the unapproved '90 zoning map was used to deny the building permit although the '90 zoning map was unlawfully changed by the MNCPPC after the oral and written denial of the building permit application.

[13] Petitioners' Appendix Z, App. 180a.

records of the MNCPPC[14] show that the boundary that they so readily change was established by iron pipes and survey in 1968 with recorded Deed of Agreement to Establish Boundary Line, Petitioners' Lodging No. 2[15].

V. CONCLUSION: Maryland courts routinely give unreported opinions regarding questions of first impression and statutory interpretation[16].

This case is about more than just secretly changing a zoning map and denying a building permit based on the changed zoning map in a small county next to the nation's capital. It is about the judicial system, *stare decisis*, fundamental fairness, fair consideration of the dispositive issues with articulated reasoning that applies equally to all similarly situated landowners. It is about detrimental reliance on the proper governmental official. It is about unreported opinions on issues that have never before been decided by a state court relating to state law, due process and equal protection. It is about making those decisions applicable only to the litigants with no reasonable or rational basis for determining the unlucky candidate to have his or her opinion unpublished. It is about the perception of the state courts and

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[14] The Deed of Agreement to Establish Boundary Line, Petitioners' Lodging No. 2, was from the records of the MNCPPC in their file to the property just north of the Petitioners when it was rezoned some years previous to Petitioners' ownership. It is noted that Thomas F. Duley, et al. now own the parcel referred to in the Deed of Agreement to Establish Boundary Line as the 'Junkins property' and the owners of the 'Bowling property' were the predecessors in title to the Smiths, the Petitioners.

[15] The bearings of the property line in Opposition Lodging Nos. 1 and 2 are to the WSSC Datum, true north, and the bearings in Petitioners' Lodging No. 2, as specified in the deed, are to magnetic north. The difference between the two bearings gives the local variation (the measurement between true north and magnetic north).

[16] Petitioners' Appendix A, App. 9a, first sentence. Note that the 1st CSA was an unreported opinion.

how they do their job. It is about something we all strive to improve and perfect, even though we have differences of opinion.

It is about inconsistent opinions of the same state appellate court and the denial of a jury trial and a cause of action created by 42 U.S.C. 1983[17].

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

*Jess Joseph Smith, Jr.
P.O. Box 1995
14518 Church Street
Upper Marlboro, MD 20773
(301) 627-8200
Attorney for Maenette B. Smith and Jess Joseph Smith, as tenants-by-entirety

*Counsel of Record

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[17] All of the facts necessary to find the Respondents liable pursuant to 42 U.S.C. 1983 have been found by the Board of Appeals. It could be said from this case that Maryland does not recognize a claim under 42 U.S.C. 1983 notwithstanding that the 1st CSA indicated that the 42 U.S.C. 1983 case was well pled and remanded it for a jury trial whereas the same court in the 2nd CSA, by its holding, did not recognize or even comment on the 42 U.S.C. 1983 claim.

APPENDIX W[1]

Article 28, Annotated Code of Maryland (1995 Replacement Volume) [pertinent portions, emphasis added]

§ 8-101. Powers generally.

(a) Designation of district councils; bi-county district council. - The County Councils of Montgomery County and Prince George's County are each individually designated, for the purposes of this article, as the ***district council*** for that portion of the regional district lying within each county, respectively. ...

(b) Grant of zoning power. -

... (2) ... each ***district council,*** respectively, in accordance with the conditions and procedures specified in this article, may by ordinance adopt and amend the text of the zoning ordinance and ***may by resolution or ordinance adopt and amend the map or maps*** accompanying the zoning ordinance text to regulate, in the portion of the regional district lying within its county,... ...and (vi) the uses of land, ...

* * *

§ 8-104. Amendments to zoning regulations - Generally.

(a) Authorized procedure. -

(1) ***After duly advertised public hearing each district council*** from time to time ***may amend*** its regulations or any regulation, including ***the maps or any map,*** in accordance with procedures established in the respective zoning ordinances. ...

* * *

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[1] The Appendix letters and page numbers for the Reply Brief are continued in sequence from the Appendix to the Petition for Writ of Certiorari except that page number 170a is omitted since there is nothing printed on it and to conform to the customary printing practice of having the odd numbered pages on the right.

§ 8-106. Same - Hearings and appeals in Prince George's County.

... (d) Definitions for sections. - For purposes of this section and §§ 8-104 and 8-105 of this article herein, the word ***"amend"*** or "amendment" ***shall be deemed to include*** any modification of the text or phraseology of a regulation or of any provision of the regulations, or any repeal or elimination of any regulation or part thereof, or any addition to the regulations, or any new regulation, or ***any change*** in the number, ***shape, boundary, or area*** of the districts, or of any district, or any repeal or abolition of any map or part thereof, ***or any addition to any map, or any new map, or any other change in the map or maps.*** ...

APPENDIX X

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

MAENETTE B. SMITH, et vir, v. MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION, et al.
CAE 89-24602, Filed, Dec. 27, 1989

COMPLAINT FOR DECLARATORY JUDGMENT
and
OTHER RELIEF

* * *

WHEREFORE, your Plaintiffs pray:

1. That the Court enter an Order declaring that the entirety of Lot One 'Marlborough House' is in the CSC zone and was in the CSC zone when the building permit application was filed in this matter.

2. That the Court declare that the zoning laws, and other laws, ordinances, rules, and regulations, to the extent that they were or are valid, relating to the development of Lot One 'Marlborough House', shall be the zoning laws, and other laws, ordinances, rules, and regulations of Prince George's County, Maryland National Capital Park and Planning Commission, and the Town of Upper Marlboro, Maryland, that were in effect on the date of the filing of the building permit application 10708-89-CGU or the date of filing this Complaint.

3. For costs, interest, and attorney fees.

4. And for such other and further relief as the Court may deem just and proper.

/s/ Jess Joseph Smith, Jr.
Jess Joseph Smith, Jr.
Attorney for the Plaintiffs
P.O. Box 698
Upper Marlboro, MD 20773
(301) 627-8200

APPENDIX Y

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

CASE NO. CAE 89-24602
MAENETTE B. SMITH, *et vir*, Plaintiffs,
vs.
MARYLAND NATIONAL CAPITAL PARK & PLANNING COMMISSION, *et al.*, Defendants.

NOTE: Except for page number references that are in brackets, all other brackets have been inserted to cross-reference documents referred to in the Appendices of the instant case or explain references.

Deposition of: WARD BOURGONDIEN [MNCPPC Employee]
Date of deposition: 5/9/95

[42] BY MR. SLATKIN: [Counsel for Petitioners]

Q You are saying it doesn't change the zoning, but it does change the zoning map?

A. The only way the zoning changes is through a zoning application. That's the best way I can answer that question for you.

Deposition of: ROSCOE TIPPETT [Petitioner's surveyor]
Date of deposition: 7/19/95

[44] Q Okay. I now refer you to Exhibit No. 5--[same as Respondents' Lodging No. 2, these proceedings]

A Correct.

Q -- which shows a bearing for the subdivision line on the Smith property --

A Yes, sir.

Q -- between the CSC and the R-80 portions of that property. What is the bearing that you've assigned to that subdivision line?

A I've assigned north 19 degrees, 19 minutes and 24 seconds, and it's taken from the WSSC meridian --

Q Okay.

A -- which is a true north meridian, which is totally different from Stanley Machen's plot.

Q Well --

A Stanley Machen's plot and this have no relations whatsoever in bearings.

Q Okay. Let me ask you. You said that you've "taken that from a WSSC meridian, which is a true north meridian"?

A Yes, sir.

Q And that is opposed to a magnetic --

[45] A Correct, sir.

* * *

APPENDIX Z

THE PRINCE GEORGE'S COUNTY GOVERNMENT
BOARD OF ADMINISTRATIVE APPEALS
CAB
Upper Marlboro, Maryland
J.J. Smith, Petitioner
ZONING APPEAL

No. 10482

NOTE: The following excerpts from transcripts are from proceedings that took place on five (5) different occasions from 6/6/90 through 8/8/90. All testimony was under oath.

[29] CHAIRMAN TANCHEL: Zoning Appeal 10482. Jess Joseph Smith Jr. and Maenette B. Smith. Appeal from inaction or denial by Department of Environmental Resources and notice stating that Permit No. 10708-89-CGU for the construction of an office building with parking at 14520 Church Street in Upper Marlboro, Maryland, has been recommended for denial.

I see we have a full house tonight. Starting on my right?

MR. SMITH: Yes, sir. My name is J.J. Smith. I am an attorney in Upper Marlboro, and the petitioner, I believe, or one of the petitioners.

CHAIRMAN TANCHEL: Thank you, Jess. Maureen?

MS. EPPS: Maureen Epps, Associate County Attorney on behalf of the Department of Environmental Resources.

MR. CARR: Jim Carr with the Department of Environmental Resources, Permits Office.

MR. SMITH: Isaac Marks, I am sure, will be in shortly. He was in the other room in there.

MR. MARKS: I didn't think Park and Planning was a party in this appeal.

CHAIRMAN TANCHEL: Well, everybody is a party in this thing, from what I can see.

[30] MR. MARKS: In that case, for the record, Isaac Marks, Associate General Counsel for the Park and Planning Commission.

* * *

RUTH SENES [MNCPPC Employee]

[84] BY CHAIRMAN TANCHEL:

Q One of the things that Mr. Carr said, that when there is a recommended denial by the Park and Planning, he expects the applicant to attempt to work it out with Park and Planning. Has this been attempted?

A That is correct. Yes, the applicant did come in, met initially—to the best of my knowledge, anyway. I have seen a follow-up letter from one of my permit reviewers. He then had two subsequent meetings with me. The second meeting, he summed up the results in writing, and I responded back to him in writing, and I have a copy of his letter to me and my letter to him.

* * *

[104] THE WITNESS: Mr. Smith specifically subpoenaed this map.

MR. MARKS: And this is the map that the Permit Review Division used to make their initial decision.

CHAIRMAN TANCHEL: OK. Based on that, we will allow Ruth to put this into evidence. We will also look at [105] the zoning map that you have mentioned at the appropriate time.

THE WITNESS: All right. With regard --

CHAIRMAN TANCHEL: Do we have this listed?

THE WITNESS: No, this would be next exhibit.

MS. BURCH: That would be No. 10 [same as Petitioners' Lodging No.1, transparency, these proceedings, that is, the 8/22/88 zoning map].

MR. SMITH: Probably the best way to identify it is that it is the map dated, circled red there, for the date that is circled in red.

MR. THOMAS: 3/22/88? [Typographic error, should be 8/22/88]

THE WITNESS: Uh huh.

CHAIRMAN TANCHEL: Exhibit 10 [this was government exhibit 10, that is the same as Petitioner's exhibit 27 that is the same as Petitioners' Lodging No.1, transparency, these proceedings, the 8/22/88 zoning map] now is the zoning map that Ruth used --

THE WITNESS: That is correct. And this is the map that we had a copy of when we first reviewed, did the file review in my office on this application. ...

* * *

[107] MR. SMITH: I will testify later on. It's my understanding that that was the first time I saw this map that is referred to as Exhibit No. 10 [this was government exhibit 10, that is the same as Petitioner's exhibit 27, that is the same as Petitioners' Lodging No.1, transparency, these proceedings, the 8/22/88 zoning map] was after I had applied for a building permit. It was not in existence – well, I guess it was in existence in 1988, but it is not an adopted and approved zoning map, so it's of no value, I would respectfully submit. But it's something that the [108] Park and Planning Commission –

CHAIRMAN TANCHEL: OK. Well, I understand what you are saying. Let's continue with Ms. Senes' testimony.

THE WITNESS: All right. In any event, after Mr. Smith's concerns were raised –

MR. MARKS: Let's address DER recommended –

THE WITNESS: OK. Mr. Tanchel asked me did we still recommend against it, and the reason we still recommend against it is based on this zoning map [this was government exhibit 10, that is the same as Petitioner's exhibit 27, that is the same as Petitioners' Lodging No.1, transparency, these proceedings, the 8/22/88 zoning map].

MR. MARKS: OK.

* * *

JEAN SCHMUHL [Clerk to the District Council]

[132] MR. SMITH: That is, Exhibit 33 is the adopting resolution of the zoning map as shown on Exhibit 33(a) [same as Petitioners' Lodging No. 1, hard copy, these proceedings] is that correct?

MS. SCHMUHL: That's correct.

MR. SMITH: Since the adoption of Resolution CR-73-1977 and zoning map --I'm sorry, and Exhibit 32(a) [same as Petitioners' Lodging No. 1, hard copy, these proceedings] -- since that time, with respect to the subject property, there have been no other zoning maps that have been adopted and approved by the District Council. Is that correct?

MS. SCHMUHL: With regard to the subject property?

MR. SMITH: With regard to the subject property.

MS. SCHMUHL: That is correct.

* * *

RUTH SENES [MNCPPC Employee]

[160] BY MR. SMITH:

Q I see that. Now that 400 feet that you are referring to is not shown on the zoning map.

A That is correct.

* * *

[170] Q Have there been any changes on the subject property zoningwise that you are aware of since the map of Exhibit 32-A? [same as Petitioners' Lodging No.1, hard copy, these proceedings] That is the adopted and approved Sectional Map Amendment?

A. None whatsoever, and the zoning line appears in the same spot on every one of them.

* * *

[207] MR. SMITH: OK. And the zoning map, as shown on Exhibit 32(a) [same as Petitioners' Lodging No. 1, hard copy, these proceedings] duplicate and original, the zoning of the properties, the subject properties, remains the same today as it did in 1972. Is that correct?

MS. SENES: Do you mean in 1978?

MR. SMITH: I'm sorry, in 1977.

MS. SENES: Seventy-seven. That is correct.

* * *

[227] MR. SMITH: And the District Council are the only people who can adopt and approve zoning maps. Is that correct?

MS. SENES: That's correct.

* * *

[234] MR. SMITH: And the next time that the District Council meets, they have to meet to approve your changes. Is that correct?

MS. SENES: I can only state that I have never known of the Council to approve any changes other than a Sectional Map Amendment.

MR. SMITH: All right.

MS. SENES: They do not review the map.

MR. SMITH: And that's the way you zone and rezone property is by Sectional Map Amendment. Is that correct?

MS. SENES: Or by individual zoning application.

MR. SMITH: Or by individual zoning application. Is that correct?

MS. SENES: That is correct.

MR. SMITH: And none of those have transpired with respect to the J.J. Smith and Maenette Smith Property shown on Exhibits 32(a) [same as Petitioners' Lodging No. 1, hard copy these proceedings]. Is that correct?

MS. SENES: I have stated a number of times, to the best of my knowledge that is correct.

* * *

[280] MR. SMITH: By "this" now we are talking about Exhibit 32(a) duplicate [same as Petitioners' Lodging No. 1, hard copy these proceedings].

MS. SENES: Exhibit 32(a) [same as Petitioners' Lodging No. 1, hard copy these proceedings].

MR. SMITH: That's what I'm trying to focus in [281] on.

MS. SENES: That is correct.

MR. SMITH: This is the map that Jean Schmuhl, the Clerk of the District Council brought in here as the only map that has been adopted and approved by the District Council as we sit here today, or at least when she testified on June 26th? Do you recall that?

MS. SENES: Barring any other action that should be noted on this map.

MR. SMITH: Yes, that is correct. And this was the map that was in existence at that time?

MS. SENES: That is correct.

MR. SMITH: So it doesn't make any difference when the property was subdivided. This zoning map right here, Exhibit 32(a) [same as Petitioners' Lodging No. 1, hard copy these proceedings] is the only existing zoning map that has been adopted and approved by the District Council. Is that correct?

MS. SENES: Actually been acted upon by the Council? Yes.

MR. SMITH: Actually been acted upon --

MS. SENES: Yes.

MR. SMITH: --adopted and approved --

MS. SENES: That is correct.

* * *

[286] MR. SMITH: Exhibits numbered 10 and 11 ['88 and '90 zoning maps] have not been adopted or approved the District Council. Is that correct?

MS. SENES: That is correct.

* * *

ROSCOE TIPPET [Petitioner's surveyor]

[299] MR. MARKS: So, in that case, in light of the testimony, again I would have to just note an objection. He doesn't know if Dean Armstrong actually reviewed it.

THE WITNESS: I had conversation with Dean Armstrong, so he was privy to the review information prior to the Subdivision Review Committee. He would have had to have had that information in order to discuss the problems that we were having with the subdivision due to dedication.

BY MR. SMITH:

Q Did anyone, including Mr. Dean Armstrong or anyone else in Park and Planning, in the subdivision review process ever indicate to you that the zoning line established between parcels A and B on Exhibit 39 [original Preliminary Subdivision Plat dated Sept., 1985] was drawn incorrectly?

A. None whatsoever.

* * *

[316] BY MR. SMITH:

[317] Q: And with respect to the information -- that is, the zoning that is shown thereon, the zoning notation --was any information provided to you or objections or any statements

from Park and Planning that those zoning designations were not correct?

A. No.

* * *

[340] MR. SMITH: Oh, I understand. I just bring it to your attention because on this particular map, Park and Planning is maintaining that the zoning line and the property line are not the same within 10 feet.

MR. MARKS: But there is testimony that it is within 10 feet.

* * *

WARD BOURGONDIEN [MNCPPC Employee]

[384] BY MR. SMITH:

Q That is not my question, sir. I know they approved it in 1977. Petitioner's Exhibit No. 1 [same as Petitioners' Lodging No. 1, hard copy, these proceedings] is the only adopted and approved zoning map of the subject property that has been adopted and approved by the District Council. Is that correct?

A. True.

* * *

ALAN HIRSCH [MNCPPC Employee, Head of Subdivision Office]

[424] BY MR. MARKS:

Q Mr. Hirsch, would you state your name and place of employment for the record, please?

A My name is Alan Smith Hirsch, and I work for the Maryland-National Capital Park and Planning Commission.

Q And in what capacity are you employed with them?

A Head of the Subdivision Office for the Park and Planning Commission.

Q Is that the office that would be responsible for subdivision of lands in Prince George's County?

A Yes, sir.

Q And are you familiar with that subdivision process?

A Yes, I am.

* * *

[430] BY MR. SMITH:

Q Sir, while we are trying to get Exhibit 6 [same as Respondents' Appendix A, App. A-1, Application for Approval of Preliminary Subdivision Plat] here, prior to this preliminary plat that you are referring to, there is an application filed. Is that correct?

A That is correct.

Q And on the application itself, it does list what the existing zoning is or what the proposed zoning, or what the zoning is?

A It lists what the proposed zoning, or what the zoning is, yes.

Q All right. And this is an application on a Park and Planning form?

A That is correct.

Q And Park and Planning wants to know what the zoning is? Right?

A That is correct.

Q And it is important to know what the zoning is because how you react or how you look at the property in the process, it depends on the zoning of the property. Is that correct?

A That is correct.

* * *

[431] Q So the zoning is important to know so that you will know which rules to apply in the subdivision regulations.

A That is correct.

Q Isn't that correct, sir?

A That is correct.

Q And that includes the commercial zone too. Isn't that correct?

A That is correct.

Q Now the amount of money that someone pays by way of a fee application relates to the zoning. Is that correct?

A. That is correct.

* * *

[434] Q Now if someone submitted an application for a preliminary subdivision plat and had a particular zoning on there and it turned out that in fact that zoning was not correct, someone would make a note of that. Is that correct?

A Depending on when it was found, yes.

* * *

[434] A We have one individual that does nothing but work with that information and is constantly bringing back to us information that is incorrect when they cross-reference it later, in later dates. We keep finding that a certain amount of information is just incorrect as submitted and then put into our system.

* * *

APPENDIX AA

THE ZONING ORDINANCE
of
Prince George's County
being also
Subtitle 27 of the Prince George's County Code

SUBTITLE 27. ZONING
DIVISION 3. ZONES AND ZONING MAPS
The Prince George's County Code
(1991 Edition)

Sec. 27-111. Boundaries of zones.

(a) In determining the boundaries of any zone shown on the Zoning Map, the following rules shall apply: ...

(4) Where zone boundaries approximately follow lot lines and are not more than ten (10) feet from these lines, the lot lines shall be considered the boundaries.

(5)Where property is subdivided, or where a zone boundary divides a lot, the location of the boundary, unless it is indicated by dimensions shown on the Map, shall be scaled to the nearest foot on the Zoning Map. ...

APPENDIX BB

Annotated Code of Maryland (Michie 1998 Repl. Vol.)

THE MARYLAND LAWYERS' RULES OF PROFESSIONAL CONDUCT

Rule 1.7. Conflict of interest: General rule.

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation.

(c) The consultation required by paragraphs (a) and (b) shall include explanation of the implications of the common representation and any limitations resulting from the lawyer's responsibilities to another, or from the lawyer's own interests, as well as the advantages and risks involved.

Rule 1.8. Conflict of interest: Prohibited transactions.

...(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation. ...

Rule 1.9. Conflict of interest: Former client.

A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; ...

APPENDIX CC

THE ZONING ORDINANCE
of
Prince George's County
being also
Subtitle 27 of the Prince George's County Code

SUBTITLE 27. ZONING
DIVISION 5. APPEALS AND VARIANCES
Subdivision 1. Board of Appeals
The Prince George's County Code
(1994 Supplement)

Sec. 27-229 Powers and Duties.

(a) The Board of Zoning Appeals (known in this Division as the "Board") shall have the following powers and duties:

(1) To hear and decide appeals involving variances from the strict application of this Subtitle (commonly known and referred t in this division as variances);

(2) To hear and decide appeals where it is alleged that, in the administration of this Subtitle, there is error in the refusal of a building or use and occupancy permit, or in any other decision of the Department of Environmental Resources, the Planning Board, or any other person or body authorized to administer this Subtitle;

(3) To reverse, affirm, or modify any decision upon which the appeal is made;

(4) To compel the attendance of witnesses at hearings. The Chairman or other officers of the Board may administer oaths; ...

APPENDIX DD

Article 28, Annotated Code of Maryland (Michie 1997 Repl. Vol.)

§ 8-107. Board of zoning appeals in Prince George's County.

(a) Continuation; composition; appointment; terms.- The board of zoning appeals of Prince George's County, heretofore created, is continued. The board consists of three members, who shall be residents of that portion of the regional district within Prince George's County and appointed by the County Council of Prince George's County. The terms of members shall be four years each, dating originally from their first appointment in 1939.

(b) Vacancy; meetings; act by resolution; compensation; staff; organization and procedure; oaths; minutes.- Any member appointed for a vacancy shall serve for the unexpired term. All meetings of the board shall be public, and the members shall organize annually and elect a chairman and vice-chairman. They shall act by resolution, in which two members must concur. The compensation of members shall be as fixed by the County Commissioners of Prince George's County. The County Commissioners may provide the board of zoning appeals with executive and clerical assistance as necessary. The district council of Prince George's County may provide and specify in its zoning regulations general rules to govern the organization and procedure of the board of zoning appeals, which rules shall not be inconsistent with the provisions of this title. The board of zoning appeals may adopt, from time to time, supplemental rules of procedure not inconsistent with this title or such general rules. The board of appeals or the chairman or other officer may administer oaths and compel the attendance of witnesses. The board shall keep minutes of its proceedings.

REFERENCE TO LODGINGS

The following items were submitted to the U.S. Supreme Court Clerk's Office as a Lodging as part of this Petitioner's Reply Brief:

Lodging No. 1 -- Comprising excerpts from the pertinent parts of the zoning map of 7/12/77, Board of Appeals Petitioner's Exhibit no. 1, as a hard copy; and the pertinent parts of the zoning map of 8/22/88, Board of Appeals Petitioner's Exhibit no. 27, as a transparency.

Lodging No. 2 -- Deed of Agreement to Establish Boundary Line, first two pages.